***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 74-2405

In The

## United States Court of Appeals

For The Second Circuit

GERALD L. HERZFELD,

*Plaintiff-Appellee,*

- against -

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,

*Defendant-Appellant.*

---

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,

*Third-Party Plaintiff-Appellee,*

- against -

ALLEN & COMPANY, INCORPORATED and ALLEN & COMPANY,

*Third-Party Defendants-Appellants.*

---

ALLEN & COMPANY and ALLEN & COMPANY INCORPORATED,

*Third-Party Counterclaimants-Appellants,*

- against -

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,

*Third-Party Counterclaim Respondent-Appellee.*

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# JOINT APPENDIX

**Volume III, pp. 601a – 900a**

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to organize the questioning to try to shorten it?

THE COURT: Surely.

(Recess.)

MR. POLLACK: Mr. Lipkin.

A R N O L D L. L I P K I N, called as a witness on behalf of the Third-Party Defendants, being first duly sworn, testified as follows:

MR. POLLACK: I might note for the record, so that it will be easier to follow, my procedure that I plan is to introduce certain documents right at the start through Mr. Lipkin to avoid later interruption of his testimony.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. POLLACK:

Q Mr. Lipkin, I show you a document marked A-1 and ask you whether you recognize it as a document called Agreement For Sale Of Real Estate dated November 22, 1969, and relating to a transaction between the Firestone Group, Ltd. and Monterey Nursing?

MR. CRACO: May I inquire whether this is the same as Exhibit 12?

MR. POLLACK: Again I make the same response. I did not follow with meticulousness the exhibits in the case involving the plaintiff. I am offering these for the consistency of the record in the counterclaim in the third-party action.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE COrtlandt 7-4580

A I recognize the document.

MR. POLLACK: I offer it in evidence.

MR. CRACO: No objection.

THE COURT: Received.

xx (Exhibit A-1 received in evidence.)

Q I show you A-2, which purports to be an agreement between Firestone and Continental Recreation Company, and I ask you if you can recognize it as a copy of the document that was in the files of Firestone at the time that you did the audit?

A It is correct except that I do not recall personally seeing the last page of this particular document.

MR. POLLACK: I offer it in evidence.

MR. CRACO: No objection.

THE COURT: Received.

xx (Exhibit A-2 received in evidence.)

Q I show you a document marked A-3, which is a memorandum from R.M. Firestone to Arnold Lipkin, and ask you whether that is a copy of a document you received at or about the date it bears?

A I recognize the document.

MR. POLLACK: I offer it in evidence.

MR. CRACO: No objection.

THE COURT: Received.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

xx

(Exhibit A-3 received in evidence.)

Q I show you a document marked A-9, which purports to be consolidated work sheets of Laventhol in connection with the audit for the period ending November 30, 1969, and I ask you whether you can identify it as the work sheets, consolidated work sheets, of Laventhol?

A It appears to be.

MR. POLLACK: I offer it in evidence.

MR. CRACO: May I see it, please?

(Documents handed to Mr. Craco.)

MR. POLLACK: Just a few more, your Honor.

MR. CRACO: Give me a moment.

(Pause.)

MR. CRACO: May we go on to the next one while I look at this?

THE COURT: Sure. Maybe you ought to put it in wholesale.

Q A-10 are these Laventhol work sheets in connection with the Firestone matter?

A They appear to be.

MR. POLLACK: I offer them in evidence.

MR. CRACO: I have no objection to the receipt of Exhibit A-9.

THE COURT: Received.

(Exhibit A-9 received in evidence.)

MR. CRACO: I have no objection to the receipt of A-10.

THE COURT: Received.

(Exhibit A-10 received in evidence.)

Q I show you A-16, which are notes of Laventhol in connection with the Firestone audit, and ask you whether you recognize them as such?

A It is a work paper, yes.

MR. POLLACK: I offer it in evidence.

MR. CRACO: No objection.

(Exhibit A-16 received in evidence.)

Q Please look at A-17 and see if you can identify it.

A I recognize this work paper.

MR. POLLACK: I offer it in evidence.

MR. CRACO: No objection.

(Exhibit A-17 received in evidence.)

Q I show you A-18 and ask you the same question.

A This appears to be from the work papers.

MR. POLLACK: I offer it in evidence.

MR. CRACO: All right.

(Exhibit A-18 received in evidence.)

Q Finally I show you A-20, the audit review question

naire which bears your signature or appears to bear your signature, and I ask you if you can identify it as a copy of a document which you in fact signed in connection with the Firestone audit?

A It appears to be from our work papers.

MR. POLLACK: I offer it in evidence.

MR. CRACO: I have no objection. I note for the record that the signature appears to be on the first of several pages which comprise the exhibit.

THE COURT: Received.

xx

(Exhibit A-20 received in evidence.)

MR. POLLACK: The Court has accepted into evidence A-1, A-2, A-3, A-9, A-10, A-16, A-17, A-18 and A-20.

Q Are you a partner of Laventhol, Krekstein?

A I am.

Q Were you the partner of Laventhol, Krekstein in charge of the Firestone audit in November and December, 1969?

A I was.

Q Did you know that the financial report and financial statements which Laventhol was preparing were being prepared for the purpose of aprivate placement by Allen & Co., Inc.?

A I did.

Q Did you know that Allen & Co., Inc. was going to rely on the correctness of the financial report and financial statements of Laventhol?

MR. CRACO: I object to the form of the question. It is not Laventhol's financial statements. I assume he means Firestone's.

THE COURT: Sustained.

Q You understood, did you not, Mr. Lipkin, that these financial statements and the Laventhol report would be presented to Allen & Co., Inc. in connection with their participation in the private placement of seven and a half million dollars of securities of the Firestone Group, Ltd.?

A I did.

Q In connection with your audit, did you review a financial statement of Continental Recreation Company?

A I did not, no.

Q In connection with your audit, did you review a Dun & Bradstreet Continental Recreation Company?

MR. CRACO: I think we may be running into an ambiguity at some point. Does Mr. Pollack mean "you" in the sense of Laventhol and its audit team or "you" in the sense of Mr. Lipkin, this witness? As to some questions it may make a difference. I would like Mr. Pollack to be clear about which he means.

THE COURT: Let's have "you" mean the witness unless you indicate otherwise.

A I did not review a Dun & Bradstreet report.

Q Did you have written confirmation from Continental Recreation Company of their acquisition of $15,000,000 of Nursing Homes from Firestone?

A I did not have written confirmation.

Q Did you see any correspondence whatsoever between Continental and Firestone on this transaction prior to issuing your report dated December 6?

A I did not see any correspondence.

Q Did you see any corporate minutes --

THE COURT: Please keep your voice up. It is very hard for me to hear you. Perhaps if you examine from over here it will help the witness to keep his voice up.

Q Did you see any corporate minutes of Firestone on the sale to Continental prior to issuing your report dated December 6th?

A I did not see any corporate minutes.

Q Did you check to see whether there was a corporate resolution of Firestone authorizing Firestone to engage in the transaction with Continental?

A I did not see or did not check a corporate resolution.

Q Did you see a title search of the Monterey properties prior to issuing your report dated December 6th?

A I did not see a title search.

Q Did you see any deed to the properties involved in the $15,000,000 sale to Continental prior to issuing your report?

A I did not see any deed.

Q Did you see any entries on the books of original entry of Firestone reflecting the $15,000,000 sale prior to issuing your report dated December 6th?

A I did not look at the books of original entry.

Q Do you know whether there were any entries on the books of original entry of Firestone reflecting the sale prior to the time you issued your report dated December 6th?

A Yes.

Q Were there any entries referring to Continental?

A There was a receipt of $25,000 on the books.

Q Prior to December 6th?

A Prior to December 6th.

Q Was it entered on the books of Firestone with specific reference to Continental Recreation Company and the transaction involving $15,000,000 of Nursing Homes?

A I cannot say that, not having seen the books of

original entry.

Q Were the entries relating to this transaction between Firestone and Continental placed on the books of Firestone at the instruction of Laventhol after the private placement of December 16th?

A I do not know what you mean by the word "instruction."

Q Did Laventholwrite to Firestone and enclose journal entries to be made reflecting the alleged sale of $15,000,000 of Nursing Homes subsequent to the private placement at December 16, 1969?

A I do not know what you mean by the word "allege."

Q You never heard the word "allege"?

A I know what the word "allege" means.

Q You know there is an issue in the courtroom as to the nature of this transaction?

THE COURT: Let's put another question. Don't argue.

Q did Laventhol instruct Firestone or provide Firestone with journal entries to be made reflecting the $15,000,000 sale to Continental subsequent to the time that Firestone made the private placement of seven and a half million dollars on December 16?

A During the course of our audit adjusting journal

entries were prepared. Those journal entries subsequently after approval with management, were submitted to Mr. Wadley, I believe, for placement upon the books of the company.

Q Do you consider the entry of a $15,000,000 transaction in a company that otherwise had sales of $6,000,000 to be an adjusting journal entry?

A I don't quite know what you mean by the word --

THE COURT:

Those sales represent two-thirds of $15,000,000. Do you consider that an adjusting entry? That is what he means.

THE WITNESS: The connotation. It is not unusual. In fact, it is done quite often for accountants to prepare entries and to suggest the nature of the entries to management when the management and the controller do not know how to handle it.

Q Do you consider it an adjusting entry when it represents 70 per cent of the sales of the company?

A An omission of a transaction that should be on the books should be prepared by the auditors.

Q Please answer the question. I don't believe you have.

MR. CRACO: I think he has.

THE COURT: I don't think so. At least not in

full.

MR. POLLACK: May I ask that the question be read to the witness again, please?

(Record read.)

A I see nothing wrong with the entry and I see nothing wrong with making an adjusting entry that might represent a substantial portion of the sales.

THE COURT: Do you consider it an adjusting entry?

THE WITNESS: I consider it as an entry that should be upon the books of the company.

THE COURT: Did you hear the Court's question? If you don't want to answer it, all right.

THE WITNESS: I am trying to answer it. I am trying to be very responsive.

MR. CRACO: I have tried not to interrupt, but I must object to the form of the question which implies that the characterization of an entry as an adjusting entry has to do with the magnitude of it. The witness has several times tried to say it doesn't have anything to do with the magnitude.

THE COURT: That is what I would like him to say.

MR. CRACO: May I have the answer read back,

please?

THE COURT: He has evaded answering.

MR. CRACO: May I have the last answer read back? I think it was directly responsive to that point.

MR.POLLACK: We still have not got an answer.

MR. CRACO: May I have the last answer read back?

(Record read.)

THE COURT: Now would you answer the question? Do you consider it an adjusting entry, yes or no, in this entry here of this magnitude and that proportion of the company's sales?

THE WITNESS: The company's books did not properly reflect the transaction for the sale. We prepared an entry which properly reflected that transaction. I do not know, sir, whether it is a correcting entry or an adjusting entry.

THE COURT: He asked you how you considered it. You are a CPA. We are not.

THE WITNESS: The terminology would be "adjusting entry."

Q Have you ever seen an adjusting entry to be 70 per cent of the sales of a company?

A I have, sir.

Q In what situation?

A I have had occasion when companies have started and they have presented transactions and they have not had books and records set up properly where, after an analysis of the books and entries, we have given them the amounts and we have given them a hundred per cent of sales.

Q Had Laventhol not done an earlier statement for Firestone?

A You asked me previously, sir, if I had ever seen it in any situation. Now we are back to Firestone.

MR. POLLACK: Your Honor, I have a right to have an answer to these questions. They are being evaded.

THE COURT: Mr. Pollack, I am quite aware of what your rights are. Just say: "Your Honor, would you direct the witness to answer the question?" I have told him to answer.

THE WITNESS: May I have the question?

THE COURT: Has Laventhol made an earlier audit of the books of Firestone?

THE WITNESS: Yes.

Q In connection with that earlier audit, did you see that proper procedures were instituted at Firestone for the recording of their transactions?

A They had a system for recording transactions.

T6

Q So that this was not a start-up situation such as you described in other cases, was it?

A During the prior audit, I do not believe that there had been any sales as yet.

MR. POLLACK: Your Honor --

THE COURT: Will you answer it, please? This was not a start-up situation?

THE WITNESS: No, sir.

THE COURT: Of a new company that didn't have any books yet, was it?

THE WITNESS: No, sir.

Q Did you see a closing statement for the $15,000,000 sale to Continental Recreation Company prior to issuing your report dated December 6?

A No, sir.

Q Did you ever see a closing statement for a $15,000,000 sale from Firestone to Continental Recreation?

A No.

Q In fact, one does not exist, does it?

A I do not know.

Q To the best of your knowledge, no such statement exists, does it?

A That is true.

Q You knew in fact, Mr. Lipkin, that at the time

of your report legal title had not passed in this transaction from Firestone to Continental, did you not?

A That is true.

Q Did you see any title insurance on the nursing home properties prior to issuing your reported dated December 6?

A No.

Q Did you ever see any title insurance on the Monterey nursing properties?

A No.

Q Was any title insurance ever obtained, to your knowledge?

A I do not know.

Q Mr. Lipkin, Exhibit A-20, which is the audit review questionnaire, bears your signature on the first page next to the words "Reviewed by" and date. Does it not?

A Yes, sir.

Q What is the date?

A December 6/7, '69.

Q Did you make the checks responsive to the various questions on Exhibit A-20 on pages 2, 3, 4 and 5?

A I do not believe so.

Q Did you, as the partner in charge of the audit,

question Mr. Schwalb as to whether he had made the checks?

A Yes, sir.

Q Did he indicate that he had made the checks and investigations where he had so checked?

A Yes,sir.

Q I call your attention to Question No. 4 on page 4, which reads, "Do the corporate minutes reflect approval by the board of directors of salaries, dividends, major contracts, et cetera?"

The column checked, and there is a choice of three, is yes, no, not applicable. Did you question Mr. Schwalb as to whether he had checked the corporate minutes to see whether they reflected approval by the board of directors of major contracts?

A I didn't ask him specifically. If he checked it, it indicated he had reviewed it.

Q Did Mr. Schwalb raise with you the absence of minutes reflecting these two contracts, one for $13,000,000 and one for $15,000,000?

A I dommt recall.

Q What is your best recollection?

A That he did not.

Q Mr. Lipkin, at the time you issued your report and financial statements dated December 6, 1969, you had

been apprised as to the net worth of Continental Recreation Company, had you not?

A Yes.

Q You had been apprised that the net worth of Continental Recreation Company was only $100,000, had you not?

A Yes, sir.

Q Did you not think it something that should be reflected in the financial statements and report of Laventhol on Firestone with respect to the ability of thepurchaser under this $15,000,000 contract that the purchaser had a net worth of only $100,000 and was purporting to enter into a $15,000,000 contract?

MR. CRACO: I object to the form of the question.

THE COURT: I will allow it.

Q Did you not think that called for disclosure?

MR. CRACO: Excuse me, your Honor, the gist of my objection is that the financial statements of course do contain on their face a calculation of the net worth.

THE COURT: They don't show the company only had a net worth of $100,000, as I recall.

MR. POLLACK: They do not, your Honor.

THE COURT: Don't you think the fact that the obligor on these contracts had a net worth of only $100,000

was a material fact?

THE WITNESS: It is a material fact, and if I can explain why it was not material in this situation, I'd appreciate it.

THE COURT: No, let counsel ask the questions. Your counsel will ask them, I am sure. He will probably have opportunity galore.

Q You knew, did you not, Mr. Lipkin, that Continental Recreation Company was not even going to make this purchase for itself, did you not?

A Yes.

Q You knew, Mr. Lipkin, did you not, that this $15,000,000 purchase by Continental was for some unnamed Hawaiian investors, did you not?

A No.

Q Had you been so advised?

A We knew the nature of the purchaser's business but we had not been apprised as to who probably would buy the property from him if it were to be sold by him.

MR. POLLACK: May I have the last two questions and answers reread, please?

(The last two questions and answers were read.)

Q You say you knew the nature of the purchaser's business, and I now ask you who was the purchaser under the

contract.

A Continental Recreation.

Q What did you know about the nature of the business of Continental Recreation?

A I believe that Continental Recreation was a company controlled by Max Ruderian and Albert Spiegel, who was in the syndication business.

I believe that Continental itself had some other kind of business, but I do not recall the exact nature of it.

Q You knew, did you not, that neither Ruderian nor Spiegel nor anyone else put their guarantee on this contract for Continental?

A Yes.

Q You knew in fact that Continental was in the miniature golf course business, did you not?

A I do not recall exactly what business they were in.

Q Exhibit A-3, which is a letter from Mr. Firestone to you dated December 2, 1969, states, and I quote, "Continental Recreation has a net worth of over $100,000. It holds some miniature golf courses plus other assets."

I ask you the question again: you did know at the time of your December 6th report and financial

statements that the business of Continental Recreation was miniature golf courses, did you not?

A I do with that refreshment, yes.

Q Did you inquire as to what the other assets besides the miniature golf courses were of Continental Recreation?

A I had not looked at the balance sheet.

Q I ask youwhether you inquired either of Firestone, Continental, or anybody else as to what the other assets held by Continental were besides these miniature golf courses?

A No, I did not.

Q Did you think that was prudent conduct on the part of the senior partner in charge of audit?

A In the light of all the circumstances, I think we acted prudently.

Q Did you inquire as to whether Continental Recreation Company had ever entered into a transaction of the magnitude of $15,000,000 or anything close to $15,000,000 prior to this transaction?

A No, I did not.

Q Did anyone at Laventhol, to your knowledge?

A We knew that the principals of Continental had been involved in deals to a much, much greater extent than

that.

MR. POLLACK: Your Honor, I respectfully ask that the Court direct an answer to the question.

THE COURT: Yes, answer the question, please.

THE WITNESS: Just repeat the question.

(The last two questions and intervening answer were read.)

A I do not know, sir.

Q Do you know of any such inquiry by anyone at Laventhol?

A No, sir.

Q Would any major written inquiry by Laventhol be reflected in its work sheets?

A Yes, sir.

Q Would any major oral inquiry by Laventhol be reflected in its work sheets?

A I got lost between the colloquy, sir.

MR. POLLACK: I will strike the question.

Q I go back to the question, Mr. Lipkin, as to whether you in fact knew that this transaction was not even being contemplated by Continental for its own use, but that there was a group of unnamed Hawaiian investors involved, and I ask you whether the following questions and answers reflect your testimony on the subject, and I refer to page

119 of the deposition conducted of you in these proceedings by Mr. Haimoff, page 119, line 11:

"Q Did you get the impression from this conversation that you had, via Mr. Boyer's conversation with Mr. Ruderian, that he expected to raise the money necessary from other investors? You mentioned some people in Hawaii.

"A From people whom he normally worked with. He indicated that he worked with small groups of investors, and that he had people in Hawaii who were interested in going in with him in this deal."

Is that testimony correct?

A Yes, sir.

Q Did you make any inquiry whatsoever of who these people were in Hawaii?

A No, I did not.

Q Did you make any investigation whatsoever of their capacity to do a $15,000,000 deal?

A No, I did not.

Q In fact, you knew nothing whatsoever about these people, did you?

A No, sir.

Q Nor did anyone else at Laventhol know anything about these people, did they?

A You are talking about the people in Hawaii?

Q Yes.

A No, sir.

Q For all you know, they didn't exist; is that correct?

A Yes, sir.

MR. CRACO: I object to that.

THE COURT: Argumentative.

Q Mr. Lipkin, despite the fact that Continental REcreation Company had a net worth of only $100,000, you recorded in the income statement of Firestone a provision for liquidated damages of $185,000, did you not?

A No, sir.

Q There was no liquidated damages provision of $185,000; is that your testimony?

A Yes, sir.

Q Is it your testimony that you did not take $185,000 liquidated damages into the income statement?

A Yes, sir.

Q In your deposition conducted by Mr. Lewis in these proceedings at page 49, line 21, were you asked these questions and did you give these answers:

"Q Can you tell me, Mr. Lipkin, how you were able to justify a recognition of $185,000 for a current income item for liquidated damages for a contract of sale, which

sale you were recognizing?

"A I only indicated that we evaluated the amount of money which we thought the company would recognize" -- I suppose it means should recognize -- "presently on a conservative basis. One of the elements which we took into account at our valuation was the likelihood of collecting liquidated damages for $185,000."

Does that refresh your recollection that you in fact did take $185,000 liquidated damages into the income statement?

MR. CRACO: Excuse me, your Honor. It seems to me that on its face doesn't say that he did, and it's not inconsistent with his prior testimony.

THE COURT: Do you have some objection?

MR. CRACO: Yes, I object to the question as misleading and improper.

THE COURT: Overruled. The question is, does it refresh your recollection.

MR. CRACO: He professed no failure of recollection that required refreshment, your Honor.

THE COURT: Answer it. Does it help you remember about it or doesn't it?

MR. CRACO: Your Honor, he didn't say he forgot. He said he had not done it, and counsel is trying to frame

as a question refreshing his recollection an ostensible prior inconsistent statement that is not in fact inconsistent, and I object to that as incorporating a misleading decision.

THE COURT: All right, we will adjourn now until Tuesday morning at noon.

(Adjourned to Tuesday, October 23, 1973, at 12 o'clock noon.)

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GERALD L. HERZFELD
vs.
THE FIRESTONE GROUP, LTD., et al.

71 Civ 2209

TRIAL TRANSCRIPT DATED OCTOBER 23, 1973

NEW YORK, OCTOBER 23, 1973;
12.15 A.M.

Trial resumed.

- -

THE CLERK: Herzfeld v. Laventhol, Krekstein, Horwath & Horwath.

Gentlemen, please come up.

THE COURT: Where is Mr. Pollack? Is he out in the hall?

MR. CRACO: I havent seen him. I have seen his partner. I will take a look.

(Pause.)

THE COURT: All right, proceed.

A R N O L D L. L I P K I N, resumed.

MR. POLLACK: Your Honor, would it be convenient if I stand here and question the witness?

THE COURT: All right.

DIRECT EXAMINATION CONTINUED

BY MR. POLLACK:

Q Mr. Lipkin, at the time Laventhol issued its report and financial statements dated December 6, 1969,

you knew that there had been no title search made on the nursing inns, did you not?

A No, sir.

Q You did not know that?

A I understood that Mr. Scott had been making title searches during that period, sir.

Q Did you see a title search or a title report at any time prior to issuing your report and financial statements?

A To the best of my recollection, I did not, sir.

Q To your recollection, did anyone else at Laventhol see any such title report or title search prior to issuing the report?

A No, sir.

Q Is that reflected in the work papers?

A I do not recall, sir.

Q If anyone had seen such a title search or title report, would it be reflected in the work papers of Laventhol?

A It should be in the work papers.

MR. POLLACK: Your Honor, at this time, to complete a matter about which I questioned the witness at the close on Friday, I would like to read into the record some brief deposition excerpts.

THE COURT: All right.

MR. CRACO: Would you refer to them by page, please?

MR. POLLACK: I will.

In the deposition conducted by Mr. Lewis at page 48, line 12:

"Q Can you tell me what elements comprise the $235,000?"

There is then some colloquy and the answer is as follows at line 24:

"Several elements entered into what would be realized in any event. Basically, it consisted of $50,000 in cash plus the -- that's two $25,000 payments -- plus the $185,000 of liquidated damages."

In the deposition of Mr. Lipkin conducted by Mr. Haimoff at page 109, line 5:

"Q Now, did you review the computation of the profits which were to be included in the income statements in your report?

"A Yes, I did.

"Q Do you observe that there is included the item of liquidating damages, $185,000, in profits; do you observe that?

"A Yes, I do."

Mr. Lipkin, I show you Exhibit A-4 and ask you whether the signature on the second page of that exhibit, Laventhol, Krekstein, Horwath & Horwath, is in your handwriting.

A Yes, sir.

Q Did there come a time when you instructed Mr. Schwalb of Laventhol to obtain this statement and its other copies back from the Firestone Group, Ltd.?

A Yes, sir.

Q When?

A Sometime shortly after it was issued.

Q Did you instruct disclosure in the statement that you issued bearing the same date and the report bearing the same date, December 6, 1969, that there had been a previous statement issued and pulled back by Laventhol?

MR. CRACO: I object to the form of the question, your Honor.

THE COURT: Sustained.

MR. POLLACK: Your Honor, could I ask the error of the form so that I may get this point into evidence?

THE COURT: I think it is compound.

Q Did you instruct any disclosure of the fact that there had been two statements and two reports issued by Laventhol both bearing date December 6th and both for the period ending November 30, 1969?

A Disclosure to whom, sir?

Q To Allen & Co., Inc. or any of the purchasers in the private placement.

MR. CRACO: I object to the question as compound.

I object to it further on the assumption that the word "issued" is probably a term of art in the context with which we are dealing.

THE COURT: I think so, Mr. Pollack.

Q Did you instruct any disclosure of the fact to anyone that there were two statements and two reports both bearing the date December 6, 1969?

MR. CRACO: Same objection, your Honor. It seems to me we are proceeding upon a state of facts that is not in evidence, that there were in fact two reports issued in some technical sense.

It doesn't bear that interpretation.

MR. POLLACK: The witness just testified he issued that statement A-4.

THE COURT: Let's try it one at a time, Mr. Pollack.

MR. POLLACK: I would, if I could.

THE COURT: There are two statements in there. "Did you discuss Exhibit A with anybody, did you discuss Exhibit B with anybody."

Q Did you instruct disclosure of the fact that there had been an Exhibit A-4 prepared by Laventhol and delivered to Firestone?

MR. CRACO: Same objection, your Honor. It's exactly the same question.

THE COURT: I am afraid it is.

Q Did Laventhol disclose to Allen & Co, Inc., at any time that he had issued Exhibit A-4?

MR. CRACO: I press my objection about "issued" but --

THE COURT: Well, we will take it with that caveat.

A To a representative of Allen & Co. or to Allen & Co.? I am really not quite sure of exactly, sir.

Q Did you or anyone else at Laventhol tell anyone --

THE COURT: How can he know whether anyone else did. Did he.

Q Did you tell anyone from Allen & Co., Inc., that you had issued --

THE COURT: Can you use some other word besides issued?

Q That you had prepared and delivered to the Firestone Group, Ltd. Exhibit A-4.

A I do not believe so.

Q Did you instruct anyone at Laventhol to do so?

A No, sir.

MR. POLLACK: No further questions, your Honor.

MR. CRACO: If the Court please, since Mr. Lipkin will be a witness on my case in chief, I would reserve any questions I would otherwise ask him at this time until that time.

THE COURT: All right.

(Witness excused.)

MR. POLLACK: I call Mr. George M. Duff, Jr.

G E O R G E M. D U F F, J R., called as a witness by Defendant Allen, being first duly sworn, testified as follows:

MR. CRACO: Excuse me, your Honor. Just before lunch the other day I solicited from you and you gave a direction to Mr. Pollack to inform me of any witnesses he intended to call.

After lunch, not before, he told me of his intention of calling of three witnesses, not including Mr. Duff, and has not from that day to this told me any other witnesses he wished to call.

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UNITED STATES COURT HOUSE
FOLEY SQUARE NEW YORK 10007 TEL. [illegible]

I raise the point simply because I want very much to do what the Court instructed at the end of the session on Friday, which is pick up the pace and I would appreciate it if Mr. Pollack would now tell me any other witnesses that he intends to call so that I can be prepared to cross examine or waive cross examination of the witnesses with expedition.

I haven't the foggiest notion who Mr. Duff is.

MR. POLLACK: I told Mr. Craco at that time that I would be happy to exchange a witness list with him. He didn't see fit to exchange a witness list. I then told him who my witnesses were that day and I gave him that information in advance of their testifying.

MR. CRACO: Excuse me.

MR. POLLACK: Excuse me. Let me finish the statement, please.

This morning I decided to use Mr. Duff as a witness. I told Mr. Craco that I could not, until I saw how the trial developed, determine with certainty who my witnesses would be. I have no objection to a written exchange of witness lists with Mr. Craco. I think his unilateral demands are unfair.

MR. CRACO: If the Court please, it is simply, and I represent this to you as an officer of this court, flatly

untrue that any such proposition for an exchange was ever made to me. If it had been, I would have complied with it instantaneously.

I'll call as my witnesses, Mr. Lipkin, Mr. Boyer, Mr. Chazen of the Lavanthol firm and it is possible that I will call Mr. Richard Firestone. I would like to know who you are going to call.

MR. POLLACK: I will call as my remaining witness Mr. George Duff and it's possible, if we can obtain him, that I will call Mr. Lee Meyer.

THE COURT: If you need time to properly prepare cross examination of thie witness, Mr. Craco, I will give it to you.

MR. CRACO: Thank you, your Honor.

THE COURT: I'll have him recalled out of order as soon as you can cross examine him.

MR. CRACO: Thank you.

DIRECT EXAMINATION

BY MR. POLLACK:

Q Mr. Duff, are you an attorney and a member of the law firm of Holtzman, Wise & Shephard?

A I am.

Q How long have you been admitted to practice in the State of New York?

A Since 1940.

Q What is your specialty?

A My specialty is securities law.

Q Have you authored any treatises?

A There are two treatises -- one entitled When Corporations Go Public, which I co-authored with Mr. Carlos Israels and --

THE COURT: Again, Mr. Pollack, could you examine from over here, so the witness is looking at me when he testifies and not the back wall.

THE WITNESS: Yes, your Honor.

A The other treatise is Controlling Stockholders And Certain Insiders, which I edited in 1970 for the Practicing Law Institute.

Q Do you hold a position of responsibility in the American Bar Association?

A I do, Mr. Pollack.

Q Please identify the position.

A I am chairman of the Subcommittee on Private Issues of the Committee on Federal Regulation of the American Bar Association.

2B

Q Is Holtzman, Weiss & Shephard counsel to Allen & Co. and Allen & Co., Inc.?

A Yes, sir.

Q Do you personally handle legal matters for Allen & Co. and Allen & Co., Inc.?

A I do.

Q In 1971, did you obtain assignments for Allen & Co. and Allen & Co., Inc., of units of the Firestone Group, Ltd.?

A I did, sir.

Q Please describe the obtaining of the assignments.

A In 1971, there were a number of purchasers of the units who came to Allen & Company and principally Allen & Company, Incorporated, and said that they might have been misled in their purchases.

As a result of that, we negotiated with certain of the purchasers who had come to Allen & Company, Incorporated, for an assignment of their promissory notes to Allen & Company, Incorporated, and/or Allen & Company.

Q Were these people customers --

MR. CRACO: Excuse me. Your Honor, I move to strike so much of Mr. Duff's testimony as purports to introduce the conversations had with other unidentified purchasers of units in this matter, at least to the extent

that it cannot be used to prove the truth of what they said.

THE COURT: All right. We will take it under the state of mind exception again, not for the truth of the fact.

Q Were these persons substantially all customers and clients of Allen & Company, Inc. and Allen & Company?

MR. CRACO: I object to the question, your Honor, as to form. I don't know what "substantiallyall" means, and, if he wants to identify the purchasers, I think he can ask directly.

THE COURT: Yes. I am afraid it is indefinite, Mr. Pollack.

Q Did the assignments to Allen & Company and Allen & Company, Inc., of the units occur prior to the institution of the third-party action by Laventhol?

A I believe it did, sir.

Q Have you, at my request, during the course of this trial attempted to obtain written confirmation of the assignments that were made in 1971?

A I have.

Q I show you certain documents which I marked A-22, and ask you whether these documents reflect the acquisition in 1971 by Allen & Company and Allen & Company,

Inc., of the units of Firestone.

A Yes, they do, Mr. Pollack.

MR. CRACO: Are you proferring these in evidence?

MR. POLLACK: Yes.

MR. CRACO: The first page of the documents, which together comprise Exhibit A-22, purports to be a letter from one Elliott Hyman to Allen & Company, dated February 25, 1971. As to that, I object as to its relevancy and materiality on the issues in this litigation, but have no objection on other grounds.

The balance of the pages which are not marked but succeed that page, all purport to be documents on the letterhead of Allen & Company, signed in one form or another and obviously composed by Allen & Company, Incorporated, and as to those I have the objection with respect to materiality and relevancy, but the further objection that they are obviously self-serving instruments prepared by this party to bolster his claim in this proceeding and, as to that, I object to them.

THE COURT: May I see them?

(Handed to the Court.)

THE COURT: Overruled.

(Exhibit A-22 received in evidence.)

xx

Q You testified a moment ago that at my request during the course of this trial you attempted to obtain written confirmation of the oral assignments.

I now show you certain documents and ask you whether these reflect certain of the written confirmations that you have been able to obtain since I asked you to do so 24 hours ago.

A Yes, Mr. Pollack, they do.

MR. POLLACK: I offer them in evidence, your Honor.

MR. CRACO: I object to the admissibility of these documents, both the date of October 23, 1973, and purport to be confirmation of transactions anteceding that date on the ground that they are blatantly hearsay as to that fact and, otherwise, that they are incompetent, irrelevant and immaterial in these proceedings.

I press particularly my hearsay objection. If these people could be found for the purpose of procuring a confirmation to be put into the mouth of this witness, they could beprocured for the purpose of giving testimony under oath in this court and the effect of this is to preclude me from any examination of these purchasers of the units as to material matters such as reliance and their knowledge of their transactions underlying the

financials.

THE COURT: How do you escape the hearsay objection?

MR. POLLACK: We believe that it is part of the res gestae, your Honor.

MR. CRACO: The res gestae did not commence on October 23, 1973. It was long gone by that time.

MR. POLLACK: These documents merely confirm the transactions that occurred in 1971. Mr. Craco had a list of these purchasers.

THE COURT: I will sustain the objection; blatant hearsay.

MR. POLLACK: Your Honor, they are not introduced to prove the truth of anything. They are introduced to prove a confirmation of the assignment that occurred in 1971.

THE COURT: But that is the very point.

BY MR. POLLACK:

Q Mr. Duff, subsequent to the acquisition by Allen & Co. and Allen & Co., Inc., of the units in 1971, did Allen & Co. and Allen & Co., Inc. file a claim on those units in the reorganization proceedings in the Federal Court in California?

A They did file.

THE COURT: We have a grand jury. We will recess now until 2.15.

MR. CRACO: May we leave our papers at the table?

THE COURT: Yes.

(Luncheon recess until 2.15 p.m.)

- - -

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| Name | Direct | Cross | Redirect | Recross |
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| Arnold L. Lipkin (Resumed) | 382 | | | |
| George M. Duff, Jr. | | | | |


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New York, New York
October 25, 1973 - 12:05 p.m.

(Trial resumed.)

GEORGE M. DUFF, resumed the stand, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. POLLACK (Continued):

MR. POLLACK: Shall I proceed, your Honor?

THE COURT: Yes, Mr. Pollack.

Q Mr. Duff, you testified earlier this week that in 1971 you supervised for Allen & Co. and Allen & Co., Inc. their purchase of units of Firestone from various customers who had purchased in a private placement of 1969; is that correct?

A That is correct, Mr. Pollack.

Q Was it part of the understanding in the 1971 purchase by Allen & Co. and Allen & Co., Inc. in the 1971 purchase by Allen & Co. and Allen & Co., Inc., that they were obtaining all of the rights of the purchasers to sue under those agreements?

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

A That is correct.

MR. CRACO: I object, your Honor, to the testimony now sought to be elicited as calling for a conclusion of law.

THE COURT: Yes. I would think the instruments speak for themselves.

Q Mr. Duff, did Allen & Co. and Allen & Co., Inc., bargain for all rights which the purchasers had under the units?

MR. CRACO: Same objection, your Honor.

THE COURT: Sustained.

Q Was there any discussion, Mr. Duff, of the right to sue under these units?

MR. CRACO: Well, your Honor --

THE COURT: Sustained.

MR. POLLACK: Your Honor, at this time I would make an offer of proof that it was a part of the understanding that when the Allens purchased the units in 1971 from these various customers who had purchased in the 1969 private placement, it was part of the understanding that the Allens were acquiring their rights under the units, including the right to sue.

MR. CRACO: I object to the offer of proof, your Honor, on the grounds previously stated.

THE COURT: It is hearsay.

Do you have a written instrument of assignment of the rights? Mr. Pollack? Don't you have a written assignment of the rights, whatever they were?

MR. POLLACK: In one of the instruments there is a specific reference to the assignment of claims. That was one prepared by the attorney for the seller. In the ones prepared under the supervision of Mr. Duff, there is not an explicit statement about the rights to sue.

THE COURT: What is your theory? How do you acquire rights to sue when you buy?

MR. POLLACK: You acquire all the rights of the purchaser. Also, the right to sue under 10B5, under the case law, is assignable and it is assignable by oral assignment.

I now seek to prove the --

THE COURT: I'll let you put it in subject to briefs to strike it out. It's the only practical way to handle it now.

Frankly, my inclination is you are dead wrong so, if you have got an alternative way of doing it, you better do it. It just doesn't strike me as right.

MR. POLLACK: Your Honor, we tried to show subsequent written confirmation of the oral assignment of claims

by offering A-23.

THE COURT: Well, I'll take that on the same basis, all of this on that basis.

MR. CRACO: Your Honor, I have no objection to your taking it subject to a motion to strike, of course, but the Court did rule on the prior occasion --

THE COURT: I know I did the other day. I was frankly not feeling too well or I would have taken it at that time subject to a motion to strike, since there is no jury.

MR. CRACO: Your Honor, I understand that in that event, Mr. Pollack wishes to add an additional page to Exhibit A-23 in his proffer.

THE COURT: Let's put it in.

MR. CRACO: Your Honor, so the record is clear, I object to their admission on all the grounds previously stated.

THE COURT: Your objection is perfectly clear and preserved and I'll want a brief at the end of the trial.

MR. POLLACK: For the record right now we offer A-23.

blb

xx

MR. CRACO: Same objection.

THE COURT: I'll receive it.

(Exhibit A-23 received in evidence.)

Q Mr. Duff, to complete this line of testimony in accordance with instructions of the Court, did Allen & Company and Allen & Company, Inc. receive oral assignments of all rights, including the right to sue when they bought these units in 1971?

A Yes, it did, Mr. Pollack.

MR. CRACO: May I have a continuing objection?

THE COURT: You have a continuing objection, yes, Mr. Craco.

Q Mr. Duff, you said, "Yes, it did."

A They did. Both Allen & Company and Allen & Company, Incorporated, because there were actually two purchasers, one being Allen & Company and the other being Allen & Company, Incorporated.

They did receive, at that time, in 1971, such oral assignments.

Q 1971?

A 1971.

Q Allen & Company purchased from some of the people and Allen & Company, Inc. purchased from others?

A That is correct, Mr. Pollack.

Q Mr. Duff, to return to the subject of the reorgani-

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

zation proceedings in the Federal Court in California, did Allen & Co. and Allen & Co., Inc., after they purchased these units file claims in the reorganization proceedings?

A Yes, they did.

Q Were the reorganization proceedings in 1971?

A Yes, they were. They may have been in other years, but they certainly were in 1971.

Q Were the claims of Allen & Co. and Allen & Co. Inc. approved by the Federal Court in California?

A Yes, sir.

MR. CRACO: Excuse me, your Honor. I object to that insofar as it might be construed as being offered in some way to validate the claims. I have no objection to proof that the claims were submitted and certain action was taken on them, but I am afraid that the approval by the Court in California of certain claims for the purposes of the bankruptcy is not probative evidence on whether or not Allen & Company owned those claims for purposes of the suit here being tried.

My objection is to any inference to be drawn from them, that this testimony is being offered for the purpose of proving the validity of the claims for those purposes.

MR. POLLACK: Your Honor, we think that --

MR. CRACO: As to that, it is hearsay.

MR. POLLACK: We think that is a matter for argument and does not bear on the receipt of the testimony.

THE COURT: Well, it bears on the materiality of the testimony.

MR. CRACO: Exactly. If it is offered solely for the purpose of proving that a claim was made and certain compensation received that would mitigate damages, on that issue it may be material but, as to the ownership of the third-party counterclaiming plaintiff, of the claim here in issue, it is hearsay and except in mitigation of damages, it is immaterial.

MR. POLLACK: Among other things --

THE COURT: Again, I will take it for what's worth, but my offhand impression is that you are correct, Mr. Craco.

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Q Mr. Duff, did Allen & Co. and Allen & Co., Inc. receive preferred stock of Firestone in the reorganization proceedings?

A Yes, they did.

MR. POLLACK: Your Honor, at this time I offer in evidence a certified copy of an order of the United States District Court for the Central District of California which established the value of the preferred stock as of the date of the reorganization proceedings at $1.07 per share.

MR. CRACO: May I see it, please?

MR. POLLACK: Yes.

MR. CRACO: This is not an exhibit that you have previously shown to me.

MR. POLLACK: I have just obtained this. Would you consider it for certification?

MR. CRACO: Just a second.

May I note for the record, your Honor, that this order, the authenticity of which I do not for a moment dispute, purports to set a fair value of the preferred stock as at October 1, 1971, as described by Mr. Pollack, but does so by an order of July 3, 1973, a time at which this litigation was well under way, and the claimant who was receiving the preferred stock presumably had an eye to the

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establishment in the bankruptcy proceeding of the value that might be of assistance to him in establishing his claim here.

Consequently, I object to the receipt of this in evidence as being of any probative value at all on the value of the preferred stock received.

I might note insofar as any claim that might be made of collateral estoppel or res judicata that Laventhol, Krekstein was no party to the proceedings in California. In that posture, it seems to me that this order constitutes hearsay as to the value of the preferred stock, and hearsay which is generated during the pendency of this litigation.

MR. POLLACK: Your Honor, I would point out, and I so represent to the Court, that neither Allen & Co. or Allen & Co., Inc. had anything to do with the application. It states on its face that it is an application of the Firestone Group, Ltd. to the Court.

THE COURT: How is it probative here?

MR. POLLACK: It tends to establish a dollar value for the stock on October 1, 1971.

THE COURT: I do not see how it establishes a thing, Mr. Pollack. There is no opportunity to cross-examine, there isn't anything. There is no

evidence at all. Some court somewhere in another matter finding a value, which the defendant here was not represented at.

MR. POLLACK: Your Honor, may I make argument to the Court on that point?

THE COURT: Yes, sure.

MR. POLLACK: In 1971, as Mr. Duff has testified, several of the people who had bought in the private placement were unhappy about this i[illegible]ment --

MR. CRACO: I hes[illegible]o interrupt, but I do think it ought to fairly state the record.

The Court received that testimony, subject to my objection that it was not being received to prove the truth of the statements. So for counsel to argue now that it was in fact a true statement, it seems to me is an impermissible argument for the record.

THE COURT: Let me just hear his offer.

MR. POLLACK: As I started to say, in 1971, several people that had bought in the private placement of 1969 were unhappy. Among them were customers of Allen & Company, Inc. and Allen & Company. Allen & Company and Allen & Company, Inc. bought these units back from the purchasers.

Shortly thereafter, Firestone went into reorgani-

tion. It was bankrupt for all intents and purposes.

Allen then had the units of these people who had bought in 1969, and Allen put these units into the Federal Court in California and said: We file a claim as owners of these units, along with everybody else who owned the units, and they got certain options, one of which was to get preferred stock. They took the preferred stock.

We are now trying to establish, as a basis for our damages, the value of the preferred stock at the time that they acquired it.

This is an official court record certified by a judge of the Bankruptcy Court in California, and it is offered under Federal Rule 44 as such a document.

THE COURT: But that is not the point. The point is it just does notprove anything here.

MR. POLLACK: I respectfully differ.

THE COURT: I will take it, but I do not think it is worth the paper it is written on.

MR. CRACO: Is that Exhibit A-24?

MR. POLLACK: Yes.

xx

(Defendant's Exhibit A-24 received in evidence.)

Q Mr. Duff, is there any market today for the preferred stock of Firestone?

MR. CRACO: I object to the question. The witness has not been qualified as an expert in the market movement of the preferred stock.

THE COURT: Sustained.

Q Mr. Duff, have you made inquiry as to whether there is or is not a market for the preferred stock of Firestone?

THE COURT: Sustained.

MR. CRACO: I object. He can answer it yes or no, I suppose.

THE COURT: Answer it yes or no.

A The answer is yes.

Q What was the result of your inquiry?

MR. CRACO: Now I object as to hearsay.

THE COURT: Sustained.

MR. POLLACK: May I make an offer of proof?

If Mr. Duff were permitted to testify, he would testify that there is no market today for preferred stock of Firestone, on the basis of his inquiries and his representation of Allen, which is a holder of that preferred stock.

THE COURT: I will take it again, take that motion again, but it is subject to a motion to strike.

MR. CRACO: I object to the offer of proof for the record.

THE COURT: You concede that is what he would say if he were asked?

MR. CRACO: I suppose he would now.

Q Mr. Duff, would you so testify?

A I so testify.

MR. POLLACK: No further questions, your Honor.

THE COURT: I just want to warn you, Mr. Pollack, in my opinion it is rank hearsay.

MR. POLLACK: Thank you, your Honor.

CROSS EXAMINATION

BY MR. CRACO:

Q Mr. Duff,I show you Exhibit A-22.

MR. CRACO: I have a copy of it. Do you have the original that was marked with you? I would like to place the original in front of the witness.

While Mr. Pollack looks for that, Judge, let me perfect the record on one point. I think in the light of developments this morning on A-22, I should do so.

I object to the receipt of Exhibit A-22 at page 395 of the transcript on the basis of its self-serving character, and I regret to say that at that point I did not use the perhaps talismanic words that I regarded the documents taken as a whole and separately to be clearly hearsay. I want to add that to my objection by way of a

motion to strike.

In particular, I draw the Court's attention to the fact that each of these documents contains a statement acknowledging that Allen & Company, or, in some cases, Allen & Company, Incorporated, has paid the sum of $100,000 to the person who initials the transaction, and that on all except the first there is a confirmed or acknowledged or receipt at the bottom. I think it is pretty well established by this time that a receipt in this form, not in the ordinary course of business, is hearsay as to the receipt of those funds.

And to the extent that Mr. Pollack intends to rely for his damages on the amount he claims to have paid out to these respective purchasers, as distinguished from the face value of the units themselves, I object to that testimony in particular in this exhibit as hearsay as to that point.

Accordingly, I move to strike Exhibit A-22.

THE COURT: I will reserve on that.

MR. CRACO: Do you have Exhibit A-22 for me to show the witness, please?

MR. POLLACK: Yes.

Q Am I correct, Mr. Duff, that Exhibit A-22 consists of seven pages? Eight pages.

A Yes, that is correct, Mr. Craco.

Q Do you know who prepared the first of those pages dated February 25, 1971? The first page.

A I don't know who prepared it.

Q Do you know who prepared the second page?

By prepared in this context, sir, I mean actually draftted the language.

A I know it was drafted either by me or under my supervision.

Q Is that true of the third page?

A That is true of the third page.

Q Is it true of the balance of the pages of Exhibit A-22?

A Yes, that is true.

Q With the exception of the first page, which was not prepared by you or under your supervision, were the pages which were prepared by you or under your supervision intended fairly and accurately to reflect the transactions you then understood?

A I don't think I testified as you characterized my testimony. I said that I didn't know who had prepared the first page. It was prepared either by me or under my

supervision by another lawyer in my office.

Q I thought you testified that you didn't know who had prepared Exhibit --

A That is correct.

Q The first page.

A I did so testify. I don't find that inconsistent with my further testimony.

Q Now, referring only to pages 2 through 8 --

A Yes, sir.

Q -- of Exhibit A-22, is it your testimony that those pages were prepared either by you or someone acting under your supervision?

A That is correct.

Q Now, my question is, with respect to those pages, was it your intention, at the time of their preparation or your supervision of the preparation, that they fairly and accurately reflect the transactions which they record?

A That is certainly true.

Q Would you turn to the seventh page of Exhibit A-22. The correspondence between Allen & Company on the one hand and Freeman & Gerla, on the other, ask you whether or not in that transaction or the transaction which that purports to reflect, any portion of the common shares which formed a part of the aggregate unit was transferred by Freeman

& Gerla to Allen & Company?

A It appears that no portion of the common shares were transferred by this document.

Q So insofar as that portion of A-22 is concerned, do you wish to modify your testimony at page 394 that these documents reflect the acquisition in 1971 by Allen & Company or Allen & Company, Incorporated, of the units of Firestone?

A Yes.

Q All right. Now, would you look at the eighth page, the transaction between John H. Kaplan & Company and Allen & Company.

Is the same thing true of that transaction?

A Yes, in some cases the common shares were purchased along with the notes, and in some cases they were not. I have always thought of the units as the debentures themselves which made up the principal part of the unit.

Q Well, it is fair to say, is it not, that the units, as reflected by the note and the stock purchase agreement, consisted of a note and 5,000 shares of stock?

A It is true that in individual negotiations the common stock was not only purchased, it was a very small part of the overall unit.

Q But in certain of the negotiations the parson with

whom Allen & Company or Allen & Company, Incorporated, dealt retained an interest?

A That is certainly true.

Q By way of common shares?

A That is true.

Q Exhibit A-24 which has been received by the Court subject to a motion to strike, let me ask you just one question concerning that.

Was there a plan of reorganization of the Firestone Group approved by the Court in California, to your recollection?

A To the best of -- to my recollection, it certainly was, yes.

Q Do you remember the date as of which that reorganization was approved?

A No, I'm sure the records would show it but I don't remember the date.

Q Is there anything in A-24 that would refresh your recollection on that point?

A May I examine A-24?

Q Certainly.

A I don't see anything in this record which shows when the reorganization petition was approved. Perhaps you can show it to me.

Q Is it your recollection that it occurred in 1971 or thereafter?

A I have no firm recollection. Our firm was not in charge of reorganization proceedings and I just don't recall.

Q Look at page 2, if you would, of A-22. As I understand that communication, dated December 20, 1971, between EES Capital Associates and Allen & Company, Inc., it confirms that EES Capital has sold to Allen & Company, Incorporated for an amount of $30,600 a total of 7,039 shares of convertible preferred stock, series A, and 150 shares of common stock of the Firestone Group, Ltd.

Do you see that?

A I see that.

Q Now, my question to you, sir, is whether the promissory note of the Firestone Group was ever purchased from EES Capital Associates by Allen & Company, Incorporated?

A It appears not. It appears that this transaction, which may have been negotiated before the reorganization petition was approved may have been confirmed afterwards, but it looks as if what was acquired here was the preferred stock which came out of reorganization rather than the note itself.

Q What about the common stock, was that affected

by the reorganization?

A The common stock was not affected by the reorganization, to the best of my recollection.

Q So is it fair to say that the second page of Exhibit A-22 on its face doesn't reflect the acquisition by Allen & Company, Incorporated,, of units of the Firestone Company Group, Ltd.?

A Well, it appears to reflect what is substituted for the unit, which was the preferred stock.

Q Are you prepared to testify that for each promissory note there were exactly 7,730 shares of convertible preferred stock, series A, issued?

A No. It appears that EES Capital Corporation only purchased a portion of a unit, and consequently, they received -- if my mathematics is correct -- they must have purchased approximately a third of a unit rather than a full unit, in the original placement.

Q So your testimony is, if I may summarize it, that to the extent that you are able to construe the second page of Exhibit A-22, it reflects the post reorganization purchase of one third of the promissory note portion of a unit and 150 shares of common stock out of the 5,000 shares of common stock that were a part of that unit and which were unaffected by the reorganization? Is that a fair

summary?

A That appears to be so, yes.

Q So again, this doesn't reflect a confirmation of the acquisition by Allen & Company or Allen & Company, Incorporated, of a unit?

MR. POLLACK: Objection, argumentative.

THE COURT: Overruled.

A I don't disagree. It appears to reflect -- what happened was that the negotiations undoubtedly with some of these people continued after the reorganization was approved. At least with EES Capital, and that these were the shares which represented an aliquot portion of a unit.

Q And your best testimony, as to the aliquot portion which they represent, is that they represent one third of the promissory note portion; is that correct?

A My recollection is that they received -- that each holder of a $250,000 note received 25,000 shares of preferred stock in the reorganization. So that perhaps someone else could do the mathematics, but if you multiply this by three it comes very close to the 25,000. It looks like a third or just a little less than a third of a unit which had originally been purchased by EES Capital Corporation.

Q I draw your attention to the fact that in all the pages of Exhibit A-22 but the first there is a recital

by Allen & Company, Incorporated, or Allen & Company, as the case may be, of the receipt by Allen & Company or Allen & Company, Incorporated, of a general release from the investor to whom the letter is addressed? Is that correct?

Refer to the third paragraph of each of those pages.

A It certainly appears to be -- I think that is right. If I may just look through all of it.

Q Take a look.

A There doesn't appear to be a reference to a release in the last two pages of the exhibit. Perhaps I'm wrong.

T3a

Q I think you are right and I accept that correction and, with that correction is it fair to say that pages 1, 7 and 8 contain no reference to a lease and pages 2 through 6 do?

A It is fair to so state.

Q With respect to those transactions in which a release is mentioned, do you know whether in fact a release was given?

A I am certain that a release was given.

Q Do you have the release with you?

A I do not have any documents with me, aside from what are in my hand.

Q Do you recall whether the release instrument reserved the rights of the investor against Laventhol, Krekstein or any other party in interest in these litigations?

A I don't recall.

THE COURT: Was there a covenant not to sue or a release?

THE WITNESS: My recollection is that they were Blumberg forms of release. I am certain that Allen & Company and Allen & Company, Incorporated, at least in the ones that Mr. Craco referred to, did receive general releases of any claims which these people might have had against Allen &

The question is, when did you first begin to solicit these written confirmations, so-called?

MR. POLLACK: Objection to the form of the question.

THE COURT: Yes. Strike the word "solicit."

THE WITNESS: Your Honor, is there a question to me?

MR. CRACO: I withdraw the word "solicit."

Q At page 396 of the transcript you testified that at the request of Mr. Pollack, during the course of this trial, you attempted to obtain certain written confirmations.

My question is when you first attempted to obtain such written confirmations.

A On Monday of this week.

Q That is Monday, October 22, the holiday?

A If that's it, yes; Veterans' Day.

We got in touch with four of the --

Q That answers my question.

A And all of them gave us releases, I believe, or gave us assignments.

MR. CRACO: May I have the unresponsive portion of the answer stricken, your Honor?

THE COURT: Yes.

MR. CRACO: Bear with me and I think I might be

able to subside.

Q Let's see if we can sum this up.

Is it fair to say that Exhibit A-22 purports to reflect -- I recognize the documents speak for themselves but I would like the record to be clear about this in summary -- purports to reflect the acquisition by the respective Allen entities of seven notes, of five blocks of common stock and one transaction in respect of preferred stock and 150 shares of common stock.

MR. POLLACK: Objection, your Honor. The documents speak for themselves.

THE COURT: Yes, that's true, but I'll allow the question.

A Pardon me. I didn't hear your Honor.

MR. CRACO: He allowed the question.

A If I may just add it up --

Q Don't add it up on the document, please.

A How many notes?

Q Seven notes. All except page 2.

A Seven notes is correct.

What were the other figures?

Q Five blocks of stock of 5000 shares each, pages 1, 2, 4, 5 and 6.

A Well, not page 2. That is 150.

Q Sorry. I misread my own notes.

1, 3, 4, 5 and 6.

A That is correct.

Q And a transaction the character of which you have explained, on page 2.

A It purports to show the acquisition of 7739 shares of convertible preferred stock, Series A and --

Q And you have explained that to the best of your present recollection, is that right?

A Well, I was just explaining it again.

Q No need to repeat.

And but for the first page, not one of those pages contains an assignment of any rights, claims or what have you against Laventhol or anybody else in as many words, does it?

MR. POLLACK: Objection. The documents speak for themselves.

THE COURT: I'll allow the answer.

A I think all of these documents represent --

THE COURT: Answer the question.

A May I have the question read back, please?

Q Let me reframe it so it is clear.

A I'll answer the question if I may have it read back.

THE COURT: Read it back.

(Record read.)

A The answer to that question is no.

All of these pages --

Q That's the answer to the question.

A Let me make sure that I am answering.

THE COURT: I am sure Mr. Pollack, Mr. Duff, will give you an opportunity for any explanations.

A Well, your Honor, in answering, I want to make sure that I understood the question so that either a no or a yes may not be right in the question with the double negative.

THE COURT: Do you want it repeated?

THE WITNESS: Yes.

THE COURT: Repeat the question, please, for the witness.

(Record read.)

A Would you read the question again? It's a difficult -- I would like to answer the question.

MR. CRACO: Let me reframe the question so the witness is not under any misapprehension about it.

THE COURT: All right.

Q Pages 2 through 8 of Exhibit A-22 contain on their face no assignment by the person initialling the

acknowledgment, in as many words, of any claims to sue Laventhol, Krekstein or anybody else in connection with their original acquisition of the units.

MR. POLLACK: Objection to the form of the question.

A I would like to answer.

I think they all doprovide on their face for the assignment of such claims.

When you say "in as many words," I don't know what you mean, but I would --

THE COURT: "I hereby assign." Does it say that? Do they say, "I hereby assign"?

A They certainly do not say that, your Honor.

THE COURT: I would think that is what Mr. Craco means by "so many words."

Q Let me press the point.

In point of date, which of the pages consisting of A-22 was prepared first?

A I cannot tell you which one was prepared first. I can tell you what the dates are of each of these letters.

Q Well, is it not true that the earliest date that appears on any of them is February 25, 1971, and that that appears on the very first page?

A No. There are two letttters here that are

dated February 25, 1971.

Q One of them being the first page?

A One of them is the first page.

Q Is there any date earlier than that?

A There is no date earlier than that.

Q And on the first page, in as many words, the language reads, and I am taking a portion of it, "I have assigned to you all choses in action or other claims or causes of action which I may have against the Firestone Group, Ltd. or any other person arising in connection with my purchase of said unit."

You see that?

A The language so states.

Q Now, in any of the assignments so-called subsequent to that date or contemporaenous with that date, does that language appear?

MR. POLLACK: Objection to the form of the question insofar as it uses the words "so-called."

MR. CRACO: I withdraw "so-called."

A Well, are you referring also to the assignments which we recently got, the confirmations?

Q No, sir. I am referring to Exhibit A-22.

A I see.

That language that you read from the first page of A-22 does not appear in any other of the pages of A-22.

MR. CRACO: No further questions.

MR. POLLACK: No further questions of this witness, your Honor.

THE COURT: Mr. Haimoff, do you wish to examine?

MR. HAIMOFF: No, sir. I have no questions, your Honor.

THE COURT: You are excused.

(Witness excused.)

MR. POLLACK: Your Honor, I have tried to organize our presentation of our counterclaim proof very tightly. I have ten minutes of questions that I want to ask Mr. Lipkin on recall and this would be an appropriate time, if your

Honor pleases.

THE COURT: All right.

Mr. Lipkin?

A R N O L D L. L I P K I N, having been previously duly sworn, was recalled to the stand and testified further as follows:

the court; You are still under oath, Mr. Lipkin.

FURTHER DIRECT EXAMINATION

BY MR. POLLACK:

Q Mr. Lipkin, at the time Laventhol issued its report in the financial statements, you knew, did you not, that Firestone had not acquired legal title to the Nursing Inns in Monterey?

MR. CRACO: I object to the question as calling for the same kind of legal opinion that was addressed by Mr. Haimoff to Mr. Fell when he testified and your Honor sustained the objection.

THE COURT: Sustained.

MR. POLLACK: Your Honor, precisely the same question was asked as to the passage of legal title from Firestone to Continental. It was not objected to and it was answered by the same witness, I can quote the page.

THE COURT: If nobody objected, then he can answer. If somebody objects, it is an improper question

and it calls for a conclusion of law; whether title had passed

Q Mr. Lipkin, at the time that Laventhol issued its report in the financial statements dated December 6th, did you make a judgment as to whether Firestone had acquired legal title to the Nursing Inns from Monterey?

MR. CRACO: Well, I still object to it, your Honor. The same objection.

THE COURT: Yes. It's the same question.

Q Did you contact Monterey in connection with your audit?

A No, I did not.

Q Did you instruct anyone at Laventhol to do so?

A I do not recall what the audit program called for now.

Q Do you know of any contact between anyone at Laventhol and anyone at Monterey in connection with this audit?

A I do not, sir.

Q Did you make any investigation of the ability of Monterey to transfer title to these properties to Firestone?

A Yes, sir.

Q You personally?

A Yes, sir.

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Q What did you do?

A I spoke to Mr. Martin Scott. I asked Mr. Scott to get the information together regarding the acquisition, make the documents availableto our people.

Q Did you follow up your conversation with Mr. Scott by any inquiry directly to Monterey?

MR. CRACO: Well, I object to that as compound but it is already answered, I think.

THE COURT: Itis compound. It's bad in form, Mr. Pollack.

Q Did you make any inquiry of Monterey?

A No, sir.

Q Did you examine the first trust deed referred to in Footnote 4 of the financial statements?

A Those were a series of first trust deeds that I believe were made available to our staff.

Q Did you examine them?

A No, sir.

MR. CRACO: You are referring now to Mr. Lipkin personally?

MR. POLLACK: Yes.

A No, sir.

Q Is there any reference whatsoever in the work papers of Laventhol to substantiate your statement that the

first trust deed or the series of first trust deeds were examined by Laventhol?

MR. CRACO: I object to the question. It's improper as to form, argumentative and incompetent.

THE COURT: May I hear the question, please.

(The question was read.)

THE COURT: Overruled.

A I could not find them, sir.

Q Did you examine the second trust deed referred to in Footnote 4 of the financial statements?

A That is listed in the contract of sale.

Q Did you examine the deed itself?

A No, sir, I do not believe it had been prepared at that time.

Q Did you examine the note payable from Firestone to Monterey referred to in Footnote 4 of the financial statements?

A That is called for by the contract of sale.

Q Did you examine the note?

A No, sir.

MR. CRACO: May I have a moment, your Honor, before that question is answered in fact --

MR. CRACO: Excuse me a second, Mr. Pollack. I would like to get Note 4 before me.

Now, where were you referring to, Mr. Pollack? May I ask where you were referring to the second trust deed?

MR. POLLACK: Footnote 4.

MR. CRACO: You mean in the paragraph that says that the contract of sale provided for the following?

MR. POLLACK: I am referring to the language that says, "Secured by second trust deed."

I asked him about the second trust deed and whether he had examined it.

MR. CRACO: Just a minute, please, your Honor.

You are, then, referring to the portion of the note which purports to recite the terms of the contract?

MR. POLLACK: Mr. Craco, I am not under examination. I respectfully ask the Court to --

THE COURT: Mr. Pollack, please try to make your questions clear. There was a deed at a certain time. All you have to say is "Did you examine Exhibit A" and he says no and you can tie the two together, that that is the one referred to in the footnote at some later time.

But you complicate it by incorporating what it says in the footnote and there is an argument about what the footnote refers to.

Get the fact out.

Do you have the deed?

MR. POLLACK: There is no deed. That is the point. There never was a deed. I asked him whether he examined it and he said no.

MR. CRACO: Your Honor, my objection to this line of question --

THE COURT: The question is, was there a deed as far as he knows. That is the question.

MR. POLLACK: The question is whether he examined any deed.

MR. CRACO: Your Honor, may I just get a word in here before Mr. Pollack responds to my objection.

THE COURT: All right, go ahead.

MR. CRACO: Mr. Pollack's questions have asked whether certain documents referred to in Note 4, and I am quoting him, were examined. If you look at Note 4, the documents which he is asking about don't purport to be in existence.

THE COURT: I sustain an objection to the form of the question. I don't want to look at Note 4.

MR. CRACO: Thank you.

Q There was a note payable from Firestone to Monterey on this transaction, was there not?

A There was a note to be issued in connection with the contract of sale, yes, sir.

Q The note was never issued at the time of your audit, was it?

A No, sir.

Q The trust deeds were never entered into at the time of your audit, were they?

MR. CRACO: Your Honor, I object to this as grossly misleading. The note doesn't purport to say that they have been. It says imply that the terms of the contract --

THE COURT: Whether they were or not is something you can argue later. He is entitled to bring out the fact, the underlying facts.

Go ahead, bring them out. Overruled.

Were the trust deeds executed as far as you know?

THE WITNESS: Not at that time, sir.

THE COURT: At the time of the audit.

THE WITNESS: No, sir.

THE COURT: Do you know whether they were or were not?

THE WITNESS: The first trust deeds were existing at that time. The second had not been prepared at that time.

Q Did you see the first trust deeds at that time?

A I personally did not see them.

Q Do you know of any reference in the Iaventhal

work papers to the first trust deeds?

A I think I indicated that I could not find that.

Q Did you include in current income a figure of $25,000 which was due to be received by Firestone on January 2, 1970?

A Not specifically that number.

Q I show you A-5 and read to you, "Of the total gross profit of $2,030,500, $235,000 is included in the consolidated income statement and the balance, $1,795,500, will be considered realized when the January 30, 1970 payment is received."

Focus solely on the $235,000. Was that not composed of $185,000 of liquidated damages, the $25,000 that is listed here as upon contract execution and the $25,000 listed as on January 2, 1970?

A No, sir.

THE COURT: We will take our luncheon recess now, until 2:15.

(Luncheon recess taken.)

AFTERNOON SESSION

2.20 P.M.

MR. POLLACK: Your Honor, I call to the stand Mr. Maurice Goodman.

MR. CRACO: May I inquire whether you are through with Mr. Lipkin now?

MR. POLLACK: I will have a few more questions of Mr. Lipkin, but since Mr. Goodman agreed to come down specially, he will be very brief and I would like to put him on at this time.

THE COURT: All right.

MAURICE GOODMAN, called as a witness on behalf of the defendant Allen, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POLLACK:

Q Mr. Goodman, please speak loud and clear and address the Court so that the Court can hear you.

Did you purchase a unit of the Firestone Group, Ltd. in the placement of December 16, 1969?

A Yes, I did.

Q Did you sell your unit to Allen & Co. in March, 1971?

A Yes.

Q When you sold your unit to Allen & Co., did you assign to Allen & Co. all of your rights to sue on your unit?

A Yes, I did.

Q At the time of your purchase in a private placement of December 16, 1969, did you read the financial statements and the report of Laventhol, Krekstein?

A Yes.

Q I show you Exhibit A-5 and ask you whether this is the report of Laventhol and the financial statements which you received and read?

A Yes, this is the one.

Q Did you rely on the financial statements in the report of Laventhol in connection with your purchase?

MR. CRACO: I object to that as calling for a conclusion on the part of the witness.

THE COURT: I will allow it. Go ahead. Overruled.

A Yes, I did.

Q Did you also rely on the willingness of Allen & Co., Inc. to close the private placement as a basis for making your investment?

A Would you mind repeating that?

Q Yes. Did you also rely on the willingness of

Allen & Co., Inc. to close the private placement as a basis for making your investment?

MR. CRACO: I object to that question as to form. I do not know what that means and it assumes a state of facts not in evidence.

THE COURT: You are leading very badly, Mr. Pollack.

Q Was the fact that Allen & Co., Inc. was willing to close the private placement a factor in your investment decision?

MR. CRACO: Same objection, your Honor.

THE COURT: You are leading the witness, Mr. Pollack.

Q Mr. Goodman, what were the factors in your investment decision?

A Well, I relied very -- to a very great degree on the Allen & Company putting together this deal, which, of course, was dependent on the merits of the deal and the financial reports that were submitted to us.

MR. POLLACK: No further questions, your Honor.

MR. CRACO: May I have one moment, your Honor?

Mr. Haimoff, do you have the letter of December 16, 1969, Exhibit 6?

MR. POLLACK: Your Honor, may I just put two

questions to authenticate a signature to two documents on this?

THE COURT: All right.

BY MR. POLLACK:

Q Mr. Goodman, I show you a document which is part of Exhibit A-22, a letter dated March 17, 1971, and ask you whether it bears your signature at the bottom left?

A Yes.

Q I show you a document is part of Exhibit A-23, a letter dated October 23, 1973, and ask you whether that document bears your signature?

A Yes.

MR. CRACO: I did not hear the answer.

THE WITNESS: Yes.

CROSS EXAMINATION

BY MR. CRACO:

Q I show you Plaintiff's Exhibit 6 in this trial and ask you whether you have ever seen this document or one resembling it before?

MR. CRACO: For the record, your Honor, it is the letter of December 16, 1969, from the Firestone Group.

Q Take your time and look at it.

A I forgot the question, I am sorry.

THE COURT: Have you ever seen it?

Q Have you ever seen that document or one substantially similar addressed to you?

A Yes.

Q Yes?

A Yes.

Q Was the document that you received received simultaneously with the Laventhol report, which is Exhibit A-5 that was just displayed to you?

A I believe it was.

Q Were you present at the closing of the private placement personally?

A No.

Q It's a fact, isn't it, that you received this document and the Laventhol report after the closing, on or shortly before December 16, 1969?

A I frankly don't remember whether it was before or after the closing.

Q Well, I draw your attention to the date on the letter.

A I see the date but I don't recall the exact sequence.

Q Let me put it this way.

You didn't receive the Laventhol report or Exhibit 6 or your copy of it before December 16th, did you?

A Well, according to this letter, I didn't.

Q And that is your best recollection?

A Well, I will assume so. I don't really know.

Q I direct your attention to Exhibit A-23, which you identified as bearing your signature. Did someone contact you with regard to getting you to sign that instrument?

A Yes.

Q Who?

I think we are only dealing with the first page.

A Well, the actual agreement --

Q Excuse me, Mr. Goodman. My question is who contacted you with regard to your signing Exhibit A-23, dated October 23, 1973.

A Well, I assumed it was one of the attorneys for Allen & Company.

Q Do you know who it was?

A It could have been Mr. Duff, George Duff, because I speak to him quite often.

Q Where did you sign that document?

A This was signed in my office.

Q How many units of the Firestone Group had you acquired in connection with the private placement?

A One.

Q How many did you dispose of back to Allen & Company or Allen & Company, Incorporated?

A One unit.

Q So is it fair to say that the document that you signed on March 17, 1971, which you have identified as Exhibit A-22 as bearing your signature, reflects the same transaction as the transaction purported to be reflected

by the first page of A-23? They both refer to the single transaction with regard to one unit, don't they?

A This referred to the original purchase and this refers to the subsequent sale.

Q Would you take a moment and read Exhibit A-22, that portion of it bearing March 17, 1971, which I think you identified as having been signed by you?

A Yes.

Q Take a moment to read it. Keep in mind the date is March 1971.

A Yes.

Q I ask you again, sir, does not the page which you signed on Tuesday of this week refer to the same transaction of selling to Allen & Company the single unit that you owned as is reflected by the document of March 17, 1971?

A Yes.

Q Did anybody talk to you about including any new language in the document you signed on Tuesday that wasn't in the document you signed on March 17th?

A Actually, no.

Q When you got the document on March 17, 1971, and signed it on or about that date, where did you get it?

A Where did I get it?

Q Yes. Who gave it to you?

A Well, I think it was just mailed to my office.

Q Do you recall by whom?

A You mean who mailed the letter to me?

Q Yes.

A Well, apparently Mr. Hock, Bernie Hock.

Q Did you have any conversations with Mr. Duff about that document, referring to A-22?

A No, this is simply a sale according to an agreement for the purchase of the unit.

Q Does that document fairly and accurately reflect the transaction as you entered into it on that date?

A You mean the simple resale --

Q Does it reflect the transaction?

A Yes.

MR. CRACO: That is all.

MR. POLLACK: No further questions, your Honor.

THE COURT: You are excused.

(Witness excused.)

MR. POLLACK: I call to the stand Mr. Lee Meyer.

L E E W. M E Y E R, called as a witness by third party plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POLLACK:

Q Mr. Meyer, were you a vice-president of Allen & Company, Inc., in November and December, 1969?

A I was.

Q Are you still in the employ of Allen & Company, Incorporated?

A No.

Q When did you cease to be employed by Allen & Company, Incorporated?

A December 31, 1971.

Q Were you ever employed by Allen & Company?

A No.

Q Are you appearing here today pursuant to our subpoena?

A Yes.

Q Do you have any financial interest whatsoever in the outcome of this lawsuit?

A No.

MR. CRACO: I object to that question, your Honor.

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For the moment, Mr. Meyer has been dismissed for lack of personal jurisdiction as a third party defendant but that doesn't dispose of the question whether we can sue him again.

THE COURT: That's right.

Q Were you present with Allen & Company at the closing of the $7,500,000 private placement by Firestone on December 15, 1969?

A Part of the time.

Q Were any of the persons who purchased their units of Firestone through Allen & Company, Incorporated present at the closing?

A A few dropped in.

Q Were you given financial statements and report of Laventhol, Krekstein for the period ending November 30, 1969 and dated December 6, 1969 at the closing?

A Dated what?

Q December 6th.

A I don't recall that it was dated December 6th.

Q I show you Exhibit A-5 and ask you whether this is a copy of the report and financial statements which you were given at the closing?

A I believe it is.

Q Did you have anything to do with the preparation

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of A-5?

A No.

Q Did you read the financial statements and report of Laventhol at the closing?

A Yes.

Q Did you believe the financial statements and report of Laventhol to be true and complete at the time you read them?

A Yes.

Q In making your decision for Allen & Company, Incorporated, to close the transaction on that date, did you rely on the financial statements and report of Laventhol?

MR. CRACO: I object to the question as unnecessarily leading and assuming a state of facts not in evidence.

THE COURT: Of course it is leading but every single question so far has been.

MR. CRACO: And I have been pretty temperate about my objections.

THE COURT: I thought so.

I'll sustain the objection. It's leading.

Q In making your decision for Allen & Company to close the transaction on that date, on what did you rely?

A The point of waiting to close the transaction to

December 16th, even though the investment group had been put together prior to that time, was to wait for an audited statement.

The people who were investing and Allen & Company had always operated on the premise that there would be a closing based on an audited statement so we waited for it and it took until December 16th until they, the auditors, were ready.

Q Would you have --

MR. CRACO: May the answer insofar as it purports to describe the state of mind of the investing group as distinguished from Mr. Meyer be stricken?

THE COURT: Yes.

MR. CRACO: As to that it is hearsay.

Q Would you have agreed to close the transaction for Allen & Company, Incorporated, if you had known that the purchaser under the alleged 15 million dollar contract of sale referred to in Footnote 4 has a net worth of only $100,000?

MR. CRACO: I object to the question, your Honor. It's grossly improper.

THE COURT: What?

MR. CRACO: I think it is grossly improper, your Honor.

It plucks a particular item out of context, it is leading, it is compound, it is all the other vices that I have not been objecting to during this extended cross examination by Mr. Pollack of his own witnesses.

THE COURT: I'll sustain the objection.

Q Did you have any knowledge of the 15 million dollar sale to Continental Recreation Company, Ltd. at the time of the closing of the private placement?

A Not except as referred to in the audited statement notes.

Q Did you tell Laventhol how the transaction with Continental Recreation Company, Ltd. should be treated on the financial statements and report of Laventhol?

A No.

Q Were you active in the day to day management of the Firestone Group, Ltd.?

A No.

Q Were you an outside director of the Firestone Group, Ltd.?

MR. CRACO: I object to the characterization as to whether he was an outside director or not. He was a director or he wasn't.

THE COURT: Was he a director?

Q Were you a director of the Firestone Group, Ltd.?

A Yes, I was a director.

Q Were you located in New York at the time?

A Yes.

Q Was the company located in California at the time?

A Yes.

Q To your knowledge, was the sale of 15 million dollars of Nursing Homes by Firestone to Continental Recreation Company, Ltd. ever consummated?

A I was informed that it was not.

MR. CRACO: I object to the answer.

THE COURT: Sustained. Strike it out.

MR. POLLACK: No further questions, your Honor.

CROSS EXAMINATION

BY MR. CRACO:

Q Mr. Meyer, when was the subpoena served on you?

A Three days --

MR. POLLACK: I have the subpoena here if you would like to see it.

MR. CRACO: I'm asking the witness.

A Let me see -- last week. Friday, I believe. Might have been -- yes, Friday.

Q After the receipt of the subpoena, did you discuss it with Mr. Pollack?

A Yes.

Q When?

A Discussed it with him the week after and I discussed it with him the week before.

MR. CRACO: Now, your Honor, I want to interrupt my cross examination to make another one of these unfortunate representations I am obliged to make.

At 2:00 o'clock this afternoon I inquired of Mr. Pollack whether he intended to call Mr. Meyer and he told me that he didn't know, that Mr. Meyer was hard to reach and that he had no idea at that point and it was an hour to hour thing whether or not he was going to call Mr. Meyer.

So here I am with a witness who has been prepared for a week and a half, confronted after a flat representation not 45 minutes ago by this -- by counsel, that he didn't know whether he was going to be here.

So I will proceed as far as I can with my cross examination but then I'll ask that he be held.

THE COURT: We will recall him any time you want.

MR. POLLACK: May I speak to that point, your Honor, because this is the second incorrect statement Mr. Craco has made about the --

THE COURT: I don't like lawyers accusing each other of not keeping their word. Good lawyers put these things in writing and you don't have these rhubarbs a la

Supreme Court, New York County.

I am not used to it in this court. I don't like it. I'll hear none of it. It should have been disclosed when you sat down with each other at a pretrial conference. That is when it should have been. That is when it would have been proper to have done it and we will give counsel adequate opportunity to prepare a cross examination.

Do you want me to remove the witness and recall him at some other time?

MR. CRACO: Let me go ahead as far as I can at this moment.

MR. POLLACK: Your Honor, excuse me.

Before Mr. Craco proceeds, may I read from the transcript where three days ago I said it was my intention to call Mr. Meyer if I could get him. It was not at all certain that I would be able to get him. The mere fact that you subpoena a man doesn't necessarily mean that he will show up. We didn't know until this very hour whether he would show up.

THE COURT: Well, I don't care. I don't care about this. All I am trying to get at is the truth in this case.

Let's hear the witnesses, let's subject them to proper cross examination.

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The case has taken overly long because of this kind of nonsense.

Q Mr. Meyer, do you know Mr. Firestone when you see him?

A Yes.

Q Do you see him here?

A Yes.

Q Is he in the first row of the Court?

A Yes.

Q Now, Mr. Meyer, from time to time did you have conversations with Mr. Firestone in your capacity of his company?

A Yes.

Q How frequently would you say you had those conversations?

A That varied depending on the activity that I was engaged in at the time.

Q During the late summer and fall of 1969, how frequently did you have such conversations?

A I don't know that I can put a number on it. Maybe once or twice a week, maybe there would be two week intervals and then I would talk to him three times in one week.

Q Isn't it a fact, Mr. Meyer, that during that period of time you spoke with Mr. Firestone substantially on

a daily basis on the phone?

A No.

Q About the affiars of the Firestone Corporation?

A No.

Q It is not?

Is it your sworn testimony here, sir, that your first acquaintance with the transaciton with the Monterey Nursing Homes came as a result of your reading of Note 4 of the Laventhol report?

A I didn't testify to that, sir.

Q So it is not your testimony, is that right?

When did you first become acquainted with the fact of the transaction with the Monterey Nursing Homes?

MR. POLLACK: Objection.

Form of the question.

THE COURT: Overruled.

Answer it.

A Sometime during the fall of that year, I was told that the Firestone Group had arranged the sale, purchase and sale, involving Monterey.

Q Is it your recollection that that was as early as September or October of 1969?

A It could have been.

Q And who told you that?

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A Mr. Firestone or Mr. Scott.

Q How?

A In a telephone call.

Q What did they tell you?

A I've already testified that that is what they told me, that they had arranged the purchase and sale of a substantial piece of property.

Q Did they identify the piece of property?

A Only by the name Monterey.

Q Did they tell you what it consisted of?

A Nursing homes.

Q Did they tell you where they were?

A No.

Q Did they tell you with whom they were dealing in connection with that acquisition?

A No. I did hear the name Ruderian.

Q Did they tell you with whom they were dealing in connection with the purchase of the properties?

A No.

Q Did you hear the name Abramowitz?

A No.

Q Is it your testimony that Mr. Firestone never discussed his negotiations with the Monterey Nursing Homes with you, is that correct?

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A Other than to inform me that he had included them.

Q And he informed you of that some time in the mid-fall of 1971?

A Yes.

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Q 1969, I'm sorry.

A Yes.

Q Did there come a time when he discussed with you the disposition of these nursing homes?

A My recollection is that he told me that he had arranged a transaction which involved the sale, the purchase and sale, I should say, of virtually simultaneous transactions, as I understood it.

Q When did he tell you that?

A That is the conversation I have been referring to.

Q So, you learned that at about the same time that you learned about the acquisition, is that right?

A I think that is what I testified to previously.

Q Well, do you still testify to that? I just want to get your testimony clear.

A Yes.

Q Did he identify the purchaser of the properties at that time?

A I believe the only identification of the purchaser was the name Ruderian and I am not sure that Ruderian was an agent or was the purchaser himself.

Q You really don't know, do you?

A I told you what his identification was.

Q So, Mr. Firestone told you in words or substance

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that he was dealing with a man named Ruderian for the acquisition of these properties, is that right?

A I don't believe so.

Q What did he tell you?

A I think he told me that he was dealing with a man named Ruderian for the disposition of the property.

Q I'm sorry. For the disposition of the property, is that right?

A Yes.

Q And he told you that in mid-fall?

A The same conversation.

Q Did he tell you who Ruderian was?

A No.

Q Did you know who Ruderian was?

A No.

Q Had you ever heard of Ruderian before?

A No.

Q In the course of time between that date and the end of November of 1969, did you have further conversations with Mr. Firestone about the progress of such negotiations?

A I think I testified that he advised me that he had concluded the negotiations.

Q And it is your testimony that to the best of your knowledge and belief the negotiations had been concluded as

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of the time that you had that conversation?

A That's right.

Q Was there any further discussion between you and Mr. Firestone about that transaction subsequent to that one telephone call?

A Yes. I believe I asked Mr. Firestone whether the transaction had been completed.

Q When did you ask him that?

A Some time after that phone call I asked what the prognosis was for closing and completing the transaction because we were in the process of arranging a private placement.

Q What did he tell you?

A He said that they were working on it. It was in the hands of the lawyers and accountants.

Q By the way, do you know what lawyers it was in the hands of?

A I believe it was in the hands of Milbank, Tweed.

Q As a matter of fact, you introduced the Firestone Group to Milbank, Tweed in connection with their affairs generally, did you not?

A Generally, yes.

Q By the way, let me get your address on the record. I don't believe it is there now.

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Where do you live?

A 501 East 87th Street.

Q How long have you lived there?

A Five years.

Q What is your present business?

A I am in the venture capital business.

Q Do you have a company with which you work?

A My own.

Q What is its name?

A Lee Meyer & Company.

Q Where is that located?

A 375 Park Avenue.

Q You are familiar with the note and stock purchase agreement by which the private placement was effected?

A Yes, I am.

Q Did you have anything to do with the preparation of its terms?

A In general, I supervised the preparation of that.

Q In point of fact, you were in charge of the private placement for Allen & Company, Incorporated, at the time?

A In behalf of Allen & Company, I was supervising, yes.

Q Did you read the note and stock purchase agreement in connection with the private placement?

A Yes, I did.

Q Did you read the exhibits to it?

A Yes.

Q I show you Plaintiff's Exhibit 3 and ask you whether that is the document to which you have just been referring?

A Yes.

Q I draw your attention particularly to Exhibit B to the agreement and ask you whether you read that?

A Yes.

Q That is a set ofprojected financial statements of the Firestone Group, is it not?

A Yes.

Q As at November 30, 1969?

A Yes.

Q Did you have anything to do with the preparation of those projected financial statements?

A No.

Q Do you know who did?

A No.

Q Where did you receive them?

A From the company.

Q You received them directly from Mr. Firestone?

A No. I don't know who sent them. I assume it was somebody in the accounting department that had prepared them.

Q That is the accounting department of Firestone?

A Yes.

Q Did you discuss them with Mr. Firestone?

A I am sure that I had some questions to ask about them. I don't recall what they were.

Q What questions did you have to ask about them?

A At this juncture, I can't recall, but everytime I see a financial statement I normally had some questions as to the meaning of characterizations.

Q Did you ask any questions about the sales?

A I am sure that I asked him. I notice there is a projection in here. I am sure I asked whether that was a number we could live with in the private placement, since it was a projected number for November 30.

Q Particularly did you, in the income statement, ask of what the $17,700,000 for land and income-producing property sales consisted?

A No.

Q Did you discuss that figure at all with Mr. Firestone?

A No. I discussed the bottom line figure. The net income. I wouldn't discuss the components of the sales figure.

Q You don't care about the components of the sales figure?

A I assume that is somebody else's job, to make sure that it is there.

MR. CRACO: Read the question back and I would like an answer to it.

(Question read.)

A I am afraid I can't answer that in that form. I gave you an answer as best I could. The components of that would be land and property.

Q Yes, and did you have any conversation with Mr. Firestone about whether a portion of those sales was the Monterey transaction?

A No, I don't recall having any such discussions. I believe not.

Q Did you discuss with him whether the portion of the cost of sales related to the Monterey transaction?

A I'll give you the same answer with respect to that.

Q So the only line that you worried about was the $315,000 projected net income, is that correct?

A Yes.

Q When did you first receive Exhibit A-5, the Laventhol report?

A December 15.

Q Had you seen a draft of it prior to that time?

A I don't believe so.

Q Had you had any conversations with Mr. Firestone about its contents before December 15?

A No.

Q Had you had any conversations with anybody else in Allen & Company about its contents before December 16?

A I am sure that in that time -- no, I think the answer has to be no.

I was going to say I was sure that somebody had asked me whether the audited figures would substantially reflect the unaudited figures that we had used in arranging private placement and I couldn't answer that question.

I had no discussion. I was waiting for the audited figures.

Q Did you have any discussion with anybody at Laventhol about the audited figures or what they would show prior to December 15, 1969?

A No.

Q You did not?

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A No. I did on December 15, but not prior thereto.

Q With whom did you have a conversation from Laventhol on December 15?

A A fellow named Lipkin.

Q Anybody else?

A No, I don't believe so.

Q Was it in person or on the phone?

A In person.

Q Where did it take place?

A Offices of Jacobs, Persinger & Parker.

Q In New York?

A Yes.

Q What did you say to Mr. Lipkin on that occasion and what did Mr. Lipkin say to you?

A Well, Mr. Lipkin came into town with the Laventhol audit preparatory to close. Jacobs, Persinger & Parker was handling the closing.

Q For whom?

A For the company. And they had -- Lipkin delivered his audited statement. I read through it, looked at his treatment of a couple of items, asked him some questions, read the certification.

Q What questions did you ask him?

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A I was concerned principally about the manner of treating the deferred income and thatwas a subject of some discussion.

Q And it is your testimony that thatdiscussion was in person and held for the first time in those law offices on December 15, is that right?

A Yes.

Q Would you tell us the substance of that discussion?

A The Laventhol firm had carried a deferred income item,income not realized,which is a difficult item, as I understand it from them, to treat on a balance sheet. It is what some people have characterized as an in limbo account carried on the liability side, as opposed to the asset side, even though the company may later anticipate realizing that amount as income.

The discussion centered on where to put it and how to characterize it on the statement that they were delivering.

Q What did you say about that subject?

A I just wantedto be clear that it showed up as an income item, however they characterized it on the liability side. It's something that the company had done.

Q Was that based upon your understanding that in

fact it was something that the company had done?

A That was based on my understanding as reflected by the statement that Laventhol was presenting.

Q Was it not also based upon your understanding derived from conversations with Mr. Firestone?

A Yes.

Q In the course of that conversation, did you ask Laventhol to modify their treatment of the income in any way?

A I think I asked them to take it off a separate sheet and put it on the same sheet that all the other assets and liabilities showed on, either as a footnote or otherwise, but not to include it as a slip sheet in the opinion.

My recollection is that it came, it was presented as a slip sheet which I objected to because it wasn't bound in.

Q Was the sheet that was presented to you physically attached to the rest of the opinion?

A It was slipped inside.

MR. CRACO: May I have Exhibit 7.

Q I show you Exhibit 7, which purports to be the Laventhol, Krekstein opinion and I ask you whether that is the precise form in which you first saw that report.

A I don't believe it was.

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Q In what respect was it different?

A I believe the page captioned "Schedule of Deferred Income" was loose.

Q So it is your testimony that when you got the Laventhol report it did not contain as part of the bound volume the page headed "Schedule of Deferred Income"; is that correct?

A I believe that is right, yes.

Q Apart from the discussion that you have just described, I ask you whether or not you had any other conversation with Mr. Lipkin on that occasion about changing the treatment of income in the report?

A No.

Q Specifically, did you have any conversation about whether or not any portion of the income should be deferred?

A No. I accepted his figures. I was concerned simply with the presentation.

Q Did you have any conversation with anybody at Laventhol on any prior occasion about the subject of deferring any portion of the income from that transaction?

A Not that I recall.

Q Isn't it a fact, Mr. Meyer, that some time shortly prior to December 15th you had a telephone conver-

sation from New York with Mr. Lipkin and Mr. Chazen in which you attemped to get Laventhol to take the entire amount of income into the current period?

A False.

Q You deny that?

A Yes.

Q Do you deny that you had any telephone conversations with the Laventhol partners?

A Yes.

Q Do you know Mr. Chazen?

A Yes. I've been introduced to him.

Q Did you have any telephone conversations with him about this subject?

A No. A telephone conversation was held by Mr. Lipkin and Mr. Chazen from Jacobs, Persinger's office on December 15th. I was present in the room but I was not a party to the telephone conversation.

Q With whom did they hold that telephone conversation?

A Each other.

Q Did you have any conversations at which Mr. Firestone was present on that subject?

A I think Mr. Firestone was present on the 15th, in the room at the same time.

Q In any of those conversations did you protest the deferral of $1,795,000 worth of the income as distinguished from taking it all into current income?

A No.

Q Did you argue about it? I do not want to play with words. I want to get the substance of what occurred on that occasion.

A No.

Q Did you ask them to reconsider it?

A Not that I recall.

Q Search your memory, sir.

A I have.

Q Did you enter into this private placement with the understanding that there would be a subsequent public offering of the stock of the Firestone Group?

A No. "Understanding" is the wrong word.

Q Well, use the right word.

A The right word would be, we were hopeful that we subsequently hoped we could bring the stock forward.

Q In point of fact, was not the private placement in substitute for a public offering which, in your opinion, could not be brought off at that time?

A No, it was a substitute -- it was a sequel to a public offering that could not be held about eight or ten months previously.

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Q Let us put it this way: you had conversations with Mr. Firestone, did you not, about taking his company public?

A Yes, we did.

Q You engaged in a variety of activities on behalf of Allen & Company or Allen & Company, Incorporated, with a view towards consummating such a public offering, did you not?

A Yes, we filed a registration statement on behalf of the Firestone Group in March of 1969.

Q In the course of preparing that registration statement, you familiarized yourself generally with the activities of the Firestone Group, didn't you?

A We had made a private investment in the company almost eight or nine months before that, and I familiarized myself with their operations at that time.

Q Was anybody else at Allen & Company in charge of keeping up with what was going on at the Firestone Group?

A No.

Q You were it, right?

A Yes.

Q In the course of time, did that public offering, for want of a better phrase, abort?

A Yes.

Q When was that?

A Approximately late June, early July of 1969.

Q At about that time, did you discuss with Mr. Firestone the prospect of substituting a private placement for the public offering that had just aborted?

A I'm sure I discussed it shortly thereafter because I'm sure the company was counting on the funds.

Q From that time onward, did you acquaint yourself on a continuing basis with what was going on in the Firestone Group for the purpose of putting yourself in a position to consummate such a private placement?

MR. POLLACK: I object to the form of the question.

THE COURT: Sustained.

Q From that time on, did you set about in your capacity both as a director of Firestone and as a representative of Allen & Company to acquaint yourself with the activities of the Firestone Group with the private placement in mind?

A I did nothing differently than I had done before, which was simply to act as an outside director. I was generally familiar with their business operations and I took their -- as far as we were concerned, their business

operations were satisfactory for public offering or a private offering, and we proceeded with the private offering. We did not do any special inquiry.

Q But you were sufficiently familiar with their operations to warrant that conclusion on your part, were you not?

A Yes.

Q Where did you get all that information?

A I don't believe I testified as to any particular "all that information," sir.

Q Well, where did you get this familiarity?

A By attending board of directors meetings, reviewing what financial statements were available, and having observed the company's prior activities. The company was very well regarded in California.

Q Well regarded by you, wasn't it?

A Yes. Well regarded by the Corporation Commission in California.

Q By the way, what was the nature of their business during that period of time?

A Real estate syndication.

Q Did they do a lot of them?

A Yes.

Q Were you familiar with real estate syndications

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generally?

A To some extent, yes.

Q Were you familiar with the real estate syndications that they were doing?

A Only to the extent of initially having reviewed the type of material that was cleared by the Corporation Commission in California.

Q Where did you get that information?

A I was supplied with what was tantamount to a set of closing documents or several sets of closing documents in transactions that had been concluded.

Q By whom were you supplied those?

A Firestone Group.

Q By whom in particular, if you recall?

A I don't know who gave them to me. I'm sure they gave them to me at Mr. Firestone's direction.

Q Let me ask you one question.

MR. CRACO: And then, your Honor, I will take the option of asking Mr. Meyer to come back.

Q Would you describe to the Court the circumstances of your termination as a representative of Allen & Company in December of 1971?

A I left to formmy own business.

Q Were you asked to leave?

A No.

Q Was there any discussion at the time you left of discontent on the part of investors with whom you had placed the Firestone units?

A I'm sure they were discontented.

Q I am asking you, sir, whether there was any discussion about that subject, and I will make the question more precise: within Allen & Company.

A I'm sure there was.

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Q Did that play any part in your termination?

A No.

Q Did you have any other relationship with Mr. Firestone other than that of an outside director of one of his companies?

A No.

Q Did you ever make any inquiry as to who Ruderian was?

A No.

MR. CRACO: Your Honor, I would ask that this witness be instructed to come back tomorrow, if the Court intends to sit tomorrow, at which point I will resume my cross examination.

THE COURT: Come back at 10:00 o'clock, please.

THE WITNESS: Your Honor, may I inquire as to what time I might be free? I have a long-standing engagement.

THE COURT: I haven't the remotest notion, I'm sorry. He has to conduct the cross examination.

THE WITNESS: May I ask counsel?

It's a serious problem for me.

THE COURT: Perhaps counsel can give us some estimate.

MR. POLLACK: I have no further questions on

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redirect.

THE COURT: He hasn't finished yet. Perhaps you will.

MR. CRACO: Let me be perfectly clear about it, your Honor. I want to press a couple of points with this witness after I've had an opportunity to do a little further independent investigation.

I will be prepared to either proceed promptly at 10:00 o'clock tomorrow morning with such cross examination, and make it an expeditious as I humanly can, or if I decide that I don't want to pursue the matter, if Mr. Meyer, when he leaves the stand, gives me his phone number when he leaves tonight, I will so notify him.

THE WITNESS: That's fair.

MR. CRACO: I have no wish to impose on him, I just wish to get at the truth of the matter.

THE COURT: Leave your telephone number.

THE WITNESS: No problem. Thank you.

THE COURT: We will handle it as expeditiously as we can.

THE WITNESS: Thank you.

THE COURT: You are excused for now, subject to recall tomorrow morning at 10:00 o'clock.

(Witness excused.)

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MR. POLLACK: Your Honor, may we take five minutes to simply review where we are? I think we can shorten the proof and perhaps complete.

THE COURT: All right.

(A recess was taken.)

MR. POLLACK: Your Honor, I can brief, and then I will rest subject to one exception which I will apprise you of in a moment.

I would like to read a few brief excerpts from the deposition of Mr. Lipkin and then I would move to amend the pleadings to conform with the evidence, and since your Honor didn't admit into evidence the order of the California Court on the ground that it was hearsay, we are attempting overnight to bring an expert to New York from California to testify on the limited issue of the value of the preferred stock for purposes of laying our bases for damages.

I read from Mr. Lipkin's deposition, conducted by Mr. Lewis, at page 30, line 21.

I might adhere, your Honor, parenthetically, there is an exhibit number in the deposition which is not the exhibit number on trial.

THE COURT: Let's give it the exhibit number on trial so we all know what he is talking about.

MR. POLLACK: Good.

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"Q Exhibit A-1, that is, the Monterey Nursing Inns contract, refers to a net lease transaction between the buyer and the seller on the properties covered by that agreement. Was anyone in your office ever instructed to determine whether that net lease had been executed?

"A I don't know.

"Q Was anyone in your office ever instructed to determine whether that net lease had been prepared?"

Some colloquy.

"A I don't recall.

"Q Do you know of your own knowledge as to whether such a net lease was executed?

"A I do not."

Now, simply to put it in context, the claim is that Firestone bought this property from Monterey Nursing Inns and leased it back to Monterey Nursing Inns.

The questions I have just read go to the existence of that lease and what Mr. Lipkin knew about it.

THE COURT: I understand what the lawsuit is about, Mr. Pollack.

MR. POLLACK: Yes, sir.

Reading from the deposition of Mr. Lipkin ... by Mr. Lewis at page 66, line 9:

"Q Did there ever come a time when you made any

valuation as to whether this sale had in fact been consummated?"

Referring to the sale to Continental Recreation.

"A Subsequent to January 31, 1970, I discussed with Mr. Firestone this particular transaction. He had written a letter to me or perhaps he had informed me, I don't recall now, that there was an extension received on this transaction from Monterey Inns and that he in turn had given an extension subsequently to the Ruderian group.

"At the time I was replaced as the partner in charge of that job, I don't believe that the transaction had been consummated.

"Q Do you know of your own knowledge as to whether it was ever consummated?

"A Yes.

"Q And what did you find out?

"A It had not been consummated.

"Q To your knowledge, then, it was never consummated?

"A To the best of my knowledge, right."

At page 123 of the deposition of Mr. Lipkin conducted by Mr. Lewis, line 4:

"Q Do you know whether Firestone ever received any rents under a net lease agreement with Monterey Inns prior to December 6, 1969?

valuation as to whether this sale had in fact been consummated?"

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"Q Do you know of your own knowledge as to whether it was ever consummated?

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"A I don't recall, but if there were any, it would be on the trial balance.

"Q Do you recall whether you instructed anyone on your staff to determine whether any rents had been received by Firestone on a net lease with Monterey?

"A I didn't personally, no.

"Q Do you know whether anyone else instructed members of your staff to do so?

"A No."

The final reading from the deposition at page 153, the line is obscured by its two-thirds of the way down the page.

"Q Did you ever cause a reappraisal to be made of these properties?

"A To the best of my knowledge, I didn't."

At this time, your Honor, pursuant to Rule 15B of the Federal Rules I move to amend the answer and counterclaims of Allen & Company, and Allen & Company, Incorporated, to conform to the proof adduced on trial.

In particular, but without limiting it to this, I move that paragraph 17 through 20 be deemed amended to include all of the omissions of material fact and the misrepresentations of material fact asto which evidence has been adduced at this trial.

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With that, your Honor, and subject to the obtaining of the testimony, if we can, which will be very brief, as all of our direct testimony has been, I rest.

MR. CRACO: If the Court please, for what it is worth, I make no objection to the motion to amend the pleadings.

At this time I renew my motions and each of them to strike various portions of the testimony, and I understand that the Court wishes to take that motion under reservation.

I simply wish to renew it for the record at this time.

THE COURT: I will grant the motion to amend the pleadings, to conform with the pleading and reserve on your motion to strike.

MR. CRACO: At this time, your Honor, I would like to make a motion to dismiss the third party counterclaim.

THE COURT: He hasn't completed his proof.

MR. CRACO: Well, your Honor, he has indicated his reservation as to damages, and if I can make my point now, which doesn't go to damages at this point, but to liability, it may spare some unnamed expert a trip. I would hope so, because I urge this motion at this point with profound seriousness. I understand that I can make another motion

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if this one should be denied directed to his damage proof, but I want to talk for a moment, if I may, about the sufficiency of his prima facie case on liability, on which I now understand he has rested.

First of all, I take the position, and I state it simply for the record, that he has failed to make a prima facie case as to the alleged falsity of the representations contained in the Laventhol statement. Itis insufficient for him, as it was insufficient for Mr. Haimoff, to assert out of counsel's mouth that the Monterey transaction was hokum.

Even if, as I don't believe to be the fact, the Laventhol audit of that transaction was inadequate, there must be some proof in the record that establishes that the statement about those transactions was in fact untrue at the time that they were made. And the record is barren of any such proof on the third party counterclaim that the representations, when made, were untrue.

I pass to what to me at this point is a very solid position of law. If the Court please, we submit that

the third party accounting in this case and his prima facie case not only lacks any proof of standing, but affirmatively disposes of any possibility that he enjoys it.

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The rule in this circuit is very clear, that in order to maintain an action under 10B5, since Birnbaum against Newport Steel, a plaintiff must be either a purchaser or a seller of the securities involved. It is plain on the proof that Allen & Company was not a purchaser of the securities in the initial private placement. They don't contend, they don't offer a single shred of proof to suggest that they were.

So the transaction in connection with which the alleged misstatement was made was not one in which they were purchasers.

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Thereafter, however, they went about in 1971 collecting acquisitions from their investors of what purport in Exhibit A-22 to be conveyances to them of all or part of certain units and on those transactions, they hang their claim in this case.

But, as to those transactions, Laventhol made no misstatement. As to those transactions, the testimony of Mr. Duff is that they were motivated by some possible unhappiness on the part of the investor.

At that time, they relied in no respect upon the audited statements of Laventhol in purchasing from their investors whatever it was that they purchased. So that the transaction in which the alleged misstatement took place was not one in which they were a purchaser and the transaction in which they were purchasers was not one in connection with which the alleged misstatement was made.

THE COURT: I wouldn't understand that to be the position. Isn't their position that they stand in the shoes of their assignor?

MR. CRACO: Which is the second attempt that they make to rescue it. So let's focus on the first half of my argument on those seven out of eight pages of Exhibit A-22 that are barren of any claim of assignment of the right to sue. Those are naked conveyances of the units or portions

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of them.

As to those transactions which don't purport to be assignments of claims of right on their face, our position is that they are not purchasers in connection with the transaction claimed to be affected by the fraud.

So they attempt to bolster their position at that point by reference to the position that your Honor has just alluded to.

They take the position that they stand in the shoes of their prior investors who have conveyed the property to them either by virtue of some conveyance of rights along with the units or by virtue of explicit assignments and neither of those positions avails them.

First of all, it's reasonably plain to me under the law that their repurchase of the securities did not by itself constitute a conveyance to them of any rights which the assignors of those units might have enjoyed to prosecute Laventhol in this case.

Mr. Herzfeld is here doing just that and it seems to me perfectly plain that that right was personal to the assignors and that they did not by selling their shares to Allen & Company terminate that right and they did not, by selling it to Allen & Company convey that right to Allen & Company.

More to the point, we urge two other considerations at this point and maybe a third in a moment.

First of all, the law is --

THE COURT: Would it be a ratification to sell to Allen & Company knowing of the fraud?

MR. CRACO: I think so. I think it is perfectly clear on the issue of reliance, which I will come to in a moment, that if they buy back this stuff knowing what the situation is, they take their risks at that point and they don't manufacture for themselves a cause of action which they would not have otherwise enjoyed, knowing that what they are buying is a chose in action.

I think itis in effect a ratification or a waiver or an estoppel or something along those lines whereby a person, knowing that he is about to claim a fraudulent transaction occurred, puts himself out of pocket to get into a position where he can claim the damages of his assignor.

But I will come back to that point in a moment, if I may.

The law, Mr. Pollack said, was, in this district, that a claim under a 10B5 count could be assigned. Well, I submit to your Honor that it is not all that clear that that is the law and I want to pass over the point lightly

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at this juncture but I want to make the motion in part upon the ground that as a matter of law and as a matter of public policy, a claim under 10B5 is not the subject of a proper naked assignment.

I don't know whether a chose in action under 10B5 is a security which can be traded but I am perfectly clear that none of the prophylactic policies underlying the 1934 Act are designed to set up a marketplace in which rights under 10B5 are bought and sold as Exhibit A-22 and A-23 suggest they were here.

And so, whatever the law may have been, and I suggest it's not all as clear as Mr. Pollack suggested, I take the position that the claim of fraud which a purchaser acquires against a person whom he claims misled him is personal to him and may not be the subject of an assignment giving the assignee fresh rights to assert those claims.

But even if that should be the law, it is perfectly clear that the assignee takes no better rights than the assignor and when the assignee comes to court to sue against the allegedly misleading person, he must prove his assignor's case. He must prove the misleading statement, he must prove reliance by the assignor, not by the assignee. He must prove scienter. He must prove all of those things. He

must prove the state of mind of the person from whom he bought the claim because he cannot cut off the defenses that there was no reliance or scienter and no misrepresentation. He doesn't become a holder in due course of the 10B5 claim.

He becomes, at best, a person who, as you just phrased it, stands in the shoes of the assignor and if those shoes don't fit the prescription of a 10B5 claim then he cannot walk into this court in those shoes and claim his relief, and our proposition is on the prima facie case on the counterclaim that there hasn't been an iota of credible proof that any of the assignors of Allen & Company relied on the statement, were misled by the statement or in any other respect had a viable claim under 10B5. That is an utter failure of proof on the part of an assignee who must prove the assignor's claims.

The only exception to that was the testimony of Mr. Goodman who was brought in here this afternoon and who recited the ritualistic "I relied" in response to the appropriate leading question on direct.

But as to that it is clear that he relied on a number of things. He relied on Allen & Company's knowledge of the transaction, he relied upon the letter from Firestone and it is his best recollection that he got the

Laventhol statement after the closing. So there is not even the quantum of proof that Mr. Herzfeld has put in on his case as an investor to show that the assignors of Allen's claim here had a claim and we submit that it is Allen & Company's obligation to come into this court and to prove with respect to each of their assignors the same level of proof that Mr. Haimoff has tendered with respect to Mr. Herzfeld, insufficient though we believe that to be, because that is the only shoe in which Allen & Company can properly stand.

Finally, we make the point that your Honor referenced a moment ago. There is just no question that if by some stretch of the law the thought that this reacquisition campaign that Allen & Company went through in 1971 was a purchase or sale in connection with the alleged misleading statement, it certainly cannot be said that it was done in reliance on the Laventhol statement in any sense that is known to the 10B5 literature. They knew at that time that there was a problem. Mr. Haimoff had asserted it in his claim.

At that point they were preparing to deal with this third party action. The transactions had fallen through and Firestone is in Chapter 11 and the real motive of course comes out of all that -- it was to put them in a

position to acquire the preferred stock of Firestone in the reorganization proceeding.

And Mr. Winograd, by the way, on the third party plaintiff's direct case testified that he shifted from Allen & Company and its West Coast operations to head up the successor of Firestone after the reorganization, an event that one can infer was not beyond the ken of the people who were engaging in this acquisition campaign. But the point is that they weren't relying on the Laventhol statement in 1971.

So our position is as a matter of law that the counter-claiming plaintiff is obliged to prove the case of their assignors if they have a case at all, lacking a case by virtue of being no purchasers as in and of themselves, apart from those assignments, unable to prove the case with respect to their assignors and not having done so, and having manifestly and affirmatively not relied on the Laventhol statement, to come into possession of the rights they here assert, that they have failed to make out a prima facie case against Laventhol in this case and that Laventhol should not be held to its proof against them.

Now, I make one final point, your Honor, because it seems to me that this case has gone on long enough for it to be appropriate for me to do so.

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The defense of this audit is going to be complicated enough as it is but to deal with Mr. Meyer's testimony and with this expert valuation is going to tax the time of this Court and it seems to me appropriate to confront the issue of whether a prima facie case has been made on liability at this juncture so that if it should be, as I think it is, the law that there is no case on liability, that they have not made out a prima facie case on the elements of their alleged fraud, that they lack the standing they claim, that neither the Court nor the rest of us ought to be put to the burden of defending against that improvident claim.

Finally, for the record, I state that since all the other claims in the third party counterclaim derive in one form from the classic common law of torts and I submit are equally affected by the observations I made with respect to 10B5, my motion is addressed not only to the 10B5 count but to each and every other count that is contained in the counterclaim and at this time, your Honor, I respectfully urge you to dismiss the third party counterclaim for a clear insufficiency in law of the proof tendered in this court.

THE COURT: All right.

MR. CRACO: I alluded a moment ago to possible

further ground . I am sorry, Mr. Pollack, if I have interrupted you.

I do wonder if the releases which were discussed this morning are here in court.

MR. POLLACK: The releases are here.

MR. CRACO: May I see them, please.

MR. POLLACK: Yes.

MR. CRACO: Your Honor, may these exhibits be marked Exhibit H of the defendant?

THE COURT: Yes.

(Defendant's Exhibit H received in evidence.)

MR. CRACO: All of them, each of them, your Honor, does not purport to reserve any rights to sue and I add to my motion, the ground of my motion, with respect to the claims derived from Messrs. Lufkin, Merrick, Goodman, from EES Capital Associates, Freeman and Gerla and Seskis and Wohlsterrer, that the effective re... se of an alleged joint co-tort feasor at the time that these releases were effected was effective to release all without the reservation of rights against any of them.

THE COURT: All right, Mr. Craco.

Would that be equally a-plicable to the suit under 10-B-5?

MR. CRACO: In my opinion it is; it's a matter of federal common law and it is much mooted.

THE COURT: There is no federal common law.

MR. CRACO: Unfortunately some of the cases in the Commentator seem to think that there is. But to the extent that you look to the state law on that question, my position is that that is an effective bar to the action against the co-tort feasor at that time.

To the extent that it is a matter of federal law, the statute is silent on the subject.

For all those grounds and most particularly for the ground about the --

THE COURT: Assuming we looked to state law, what state law do we look to?

MR. CRACO: New York.

THE COURT: On what basis?

MR. CRACO: Well, my understanding of the law, and I looked at it last night, was that you look --

THE COURT: Let's assume it is a contacts principle. What are the contacts in New York?

MR. CRACO: Well, the contacts with New York, it seems to me, your Honor, are that the closing of the original transaction took place here; the assignments on which the Allen & Company's rights exclusively depend either on the

units or the claims, in connection with which the releases were given, were executed and delivered in New York, according to their face and the releases and each of them appear to have been executed in New York on forms substantially familiar to New York lawyers from Blumberg, the underlying transactions reflected in the audit, to be sure, were transactions foreign to New York but what we are talking about now is the effect of the release which it seems to me is a New York release.

THE COURT: Have you finished, Mr. Craco?

MR. CRACO: I have.

THE COURT: Mr. Pollack?

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MR. POLLACK: Your Honor, I would propose in my statement at this time to summarize very briefly what it is that is the gravamin of the case against Lavanthol and I will address myself to the question of standing and then I will address myself to the question of reliance.

The testimony in this case elicited on cross-examination --

THE COURT: It would help me, Mr. Pollack, if you could stand over there, because you are right in the light of the windows.

MR. POLLACK: The testimony that is critical in this case is a very significant part out of the mouth of Mr. Lipkin, himself. Mr. Lipkin testified on my examination before your Honor, and I respectfully urge the Court to consider it, especially pages 360 to 390. I will summarize briefly the evidence adduced by admissions under oath:

1. Lipkin was the partner of Lavanthol in charge of the Firestone audit in November and December, 1969; page 360, lines 17 to 20.

2. Lipkin knew the report and financial statements which Lavanthol was preparing were being prepared for the purpose of a private placement by Allen & Co., Inc.;

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page 360, lines 20 to 25.

3. Lipkin did not review the financial statement of Continental Recreation Company: page 361, lines 15 to 17.

4. Lipkin did not review a D & B of Continental Recreation Company; page 362, line 4.

5. Lipkin did not have written confirmation from Continental Recreation Company of the acquisition of $15,000,000 of nursing homes from Firestone; page 362, lines 5 through 8.

6. Lipkin didnnt see any correspondence whatsoever between Firestone and Continental on this transaction prior to issuing the report dated December 6; page 362, lines 9 through 12.

7. Lipkin did not see any corporate minutes of Firestone on the sale to Continental prior to issuing the report dated December 6; page 362, lines 17 through 20.

8. Lipkindid not see any corporation resolution of Firestone authorizing Firestone to engage in the transaction with Continental; page 362, lines 21 through 25.

9. Lipkin did not see a title search of the Monterey properties prior to issuing his report dated December 6; page 363, lines 2 through 4.

10. Lipkin did not see any deed to the

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properties involved in the $15,000,000 sale prior to issuing the report dated December 6; page 363, lines 5 through 8.

11. Adjusting journal entries reflecting the $15,000,000 sale to Continental were prepared by Laventhal and submitted to Wadley, the controller of Firestone, for placement on the books of Firestone 12 days after the date of the report and two days after the closing of the private placement.

12. Lipkin never saw a closing statement for the $15,000,000 sale to Continental prior to issuing the report dated December 6; page 369, lines 13 through 16.

13. Lipkin knew at the time of the report that legal title had not passed from Firestone to Continental; page 369, line 25 through 370, line 4.

14. Lipkin saw no title insurance on the nursing home properties prior to the report dated December 6; page 370, lines 5 through 8.

15. Lipkin knew that the net worth of Continental Recreation was only $100,000; page 372, lines 5 through 8.

16. The fact that Continental Recreation had a net worth of only $100,000 was a material fact; page

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372, line 24, through page 373, line 5.

You may recall that was the admission in response to a question by the Court.

17. Lipkin knew that neither Ruderian nor Spiegel, the persons who allegedly controlled Continental, had guaranteed the contract for Continental; page 374, lines 12 through 15.

18. Lipkin knew that Continental Recreation was in the business of miniature golf courses, not nursing homes; page 374, line 6, through page 375, line 4.

19. Lipkin did not inquire into whether Continental had ever entered into a transaction of the magnitude of $15,000,000 prior to this transaction; page 375, lines 18 through 22.

20. Lipkin made no investigation or did anyone else at Laventhol of the unnamed investors in Hawaii who were supposedly interested in going in on the deal with Ruderian; page 377, line 4, through page 378, line 6.

After this summary of the evidence, only that portion of which came out of the mouth of the man in charge of this audit, without ever referring to the evidence one is tempted to ask, for God's sake, what did they do? We don't know yet.

The deposition testimony indicates that Mr.

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Lipkin is going to testify that he went on the telephone --

THE COURT: Well, the question, it seems to me, Mr. Pollack, at this stage is not so much what did the accountants do but what did your alleged assignors do, how did they rely, how do you get it home to you? Assuming that is a prima facia case, if they were standing here as plaintiffs -- no. Assume that Mr. Haimoff has a prima facia case, how do you come in?

MR. POLLACK: On the question of reliance. In the Affiliated UDE v. United States in the Supreme Court of the United States, it says, and I quote, at page 761 of the official U.S. Reports, 406, "Under the circumstances of this case invdving primarily a failure to disclose," and that is one of the key points in our case," positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of his decision."

In other words, our position is that in omission cases, reliance is out; it no longer is an element of proof.

Two, even in misrepresentation cases, the law now is moving in the direction of implying reliance from

the totality of the circumstances. To that end, I would refer your Honor to the recent decision of Judge Ward in Reader v. Mastercraft Electronics Corporation, where he said, among other things, "In addition, some decisions in misrepresentation cases indicate that reliance may be inferred from the totality and circumstances."

Now, Point 3 in our position on reliance, Mr. Lipkin got on the stand and I just synopsized his testimony on this point, and said that he knew that this very statement was being prepared for Allen & Co., Inc. for the purpose of a private placement by Allen & Co., Inc. Reliance is admitted out of their mouths, much less out of ours.

THE COURT: How do you show that a single assignor, except the one who took the stand, ever even saw the statement?

MR. POLLACK: We brought the single assignor, Mr. Goodman, on as illustrative and cumulative.

THE COURT: I can't conclude from his testimony that the other seven or eight or however many there were ever saw the statement.

MR. POLLACK: Our testimony is that Mr. Meyer saw the statement. He got on the stand and said that he did and that he relied on it to close it.

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The people who bought through Allen relied on the financial statement as well as on the willingness of Allen to close it, which was predicated on Mr. Meyer's reading of that statement.

THE COURT: Your theory is that Allen in a sense was acting as agent for these purchasers?

MR. POLLACK: In a very meaningful sense, yes, your Honor.

THE COURT: All right. I just wanted to get your theory.

MR. POLLACK: So, you have a tier position on reliance.

One, we don't think it's necessary to prove it insofar as it is an omission case.

Two, if it is a misrepresentation case only, which it is not, your Honor correctly said, didn't you think it was necessary, Mr. Lipkin, to say that the Continental Recreation Company had a net worth of only $100,000 and yet was going on a $15,000,000 contract. That's an omission to state a material fact.

Even if it is, as I say, a misrepresentation case, we will take the position that the circumstances were such that it is obvious that reliance was placed on the statement. Allen wouldn't have closed it, the

investors wouldn't have bought it. It can be inferred.

Finally, we will take the position that Meyer looked at the statement, he relied on it and, to the fact that they were in fact an agent of these purchasers, they relied on it through him, but, beyond that, a number of them actually attended the closing, as Mr. Meyer said, and they were in and out, all people in the area or some of them were people in the area, and they themselves read and relied on it.

We got Mr. Goodman in, as I say, as illustrative testimony on that point. That will be our position on reliance.

On the issue of whether these claims are assignable, our position is the following:

1. A 10-B-5 claim is assignable and the cases in New York on that are legion, not the most important of which is the Derdiarian case by Judge Feinberg at 223 Fed. Supp. 265. Rule 10-B-5 claims are assignable because they are remedial in nature and not penal. They do not expire with the person.

Secondly, we have common law claims, as your Honor knows. We are trying this on two theories. One is that they were involved in a misstatement of fact or omission to disclose a material fact under 10-B-5 and,

too, our ultra vires point, which is essentially a common law claim, that they were reckless --

THE COURT: Negligent?

MR. POLLACK: Yes, utterly indifferent to the consequences of what they were doing and, as a result, we are entitled to recover on that.

On that point, as to whether common law claims are assignable, we again have cases. I'll refer your Honor to only one of a number: Leitzmann v. Willys-Overland, at 68 Fed. Supp. 873.

On the point of the assignment, in addition, it is perfectly clear that the law of New York is that an oral assignment is valid. Greene v. Republic Fire Insurance Company, 84 N.Y. 527.

One final point on this question of the assignment of the claims. It is perfectly clear, I think, from a common sense point of view, that no reservation of rights was made by these people that sold to Allen. Allen got what they had. We think they had a 10-B-5 claim.

The question as to whether later confirmation, written confirmation that I sought to have Mr. Duff obtain during the course of this trial merely to bolster the question of proving our assignment, the question as to

whether that was admissible, we respectfully differ with the ruling rendered by your Honor because we think that those documents, A-23, relate back to A-22 --

THE COURT: I allowed them in subject to a motion to strike.

MR. POLLACK: Yes, and I merely say that we suggest that is cumulative.

I think that you have here a case in which, as I said at the outset, an accounting firm did not do in connection with its audit what --

THE COURT: What about his final point, that the release that one joint tort feasor releases all of them?

MR. POLLACK: I think that is a matter we would like to brief for your Honor, but I understand that there is a case in the Second Circuit holding that a general release does not release 10-B-5 claims. I don't have the cite immediately at hand for your Honor. I will provide it for you as promptly as we can.

THE COURT: What about your common law claims? There isn't any question that under the law of New York at the time a release of one joint tort feasor released them all, is there?

MR. POLLACK: I frankly am not sufficiently versed to speak on that point, but I will be by tomorrow

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morning.

THE COURT: Well, we will reserve decision on it, then.

MR. CRACO: If I may address one point, your Honor. Of course, we have handed up a brief, a supplemental trial brief, on the issue of reliance, and we cite Reeder and Affiliated UDE and all the rest of them and since you are going to reserve overnight, I will press that point --

THE COURT: I am not reserving overnight. I am reserving. I want full briefs on all of this and a full opportunity to study the record.

MR. CRACO: Let me make one other observation at this time, if I may.

THE COURT: I might add that everytime I decided one of these from the bench, I have been right, but the Court of Appeals didn't always think so.

MR. CRACO: If the Court please, two observations, even in the teeth of that last remark: we have gone from a theory that the conveyance of the units by the assignor -- by the investors back to Allen & Company carried with it some automatic right of Allen & Company to sue on 10(b)(5), to a claim that the Allen & Company was the beneficiary of an explicit assignment of such rights, a claim which Mr. Pollack and Mr. Duff said about substantially, interestingly enough, as Mr. Goodman pointed out. If you compare Mr. Goodman's writing of October 23rd, it contains a confirmation of prior assignment. If you examine his instrument of March 17th, which he agreed was the only unit he had to give up, it does not say a word about assignment. And both he and Mr. Duff, who testified he had prepared the language or supervised its preparation, testified under oath that the March 17th instrument fairly reflected their understanding of the transaction at that time.

And it said not a word about the assignment. And perhaps imperiled by that combination of things and the necessity of making the assignor's case for them in the absence of proof of that case, we have now, on oral argument, not in the pleadings, not in the proof, but on oral argument, gone to a third theory of standing, and that is that in the original private placement Allen &

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Company somehow or other acted as the agent for the investors.

Well, first of all, there is no proof of that. But to the extent that Mr. Meyer's testimony, such as it has been, can be said to constitute proof of that, I remind your Honor of the absolutely Hornbook proposition that agency may not be proved by the testimony of the agent. It must be proved by the testimony of the principal. And no principal has come in here, no investor has come in here, and testified that he constituted Allen & Company or Allen & Company, Inc., his agent, for the purpose of imputing to that investor, whatever reliance, whatever it might have been, of Allen & Company, Incorporated, on the Laventhol statement.

So the record is still barren of any legally viable theory upon which Allen & Company, Incorporated, can obtain standing to press the claims about the 13 or 14 problems that they profess to see in the Laventhol audit.

And the second and final point that I want to make at this juncture, your Honor, is on the question of the vitality of an assignment of such a claim. I conceded, I think, in my original argument that there is some dispute about that question, and I am frank to say I am

preserving it here on the record, although not relying on it as my only point. My real only point, my really most substantive point, is the absence of proof of the assignor's case, as giving the assignee claim against Laventhol.

But on that question of the vitality of the assignment in law, the Derdiarian case, your Honor, was a decision by Judge Feinberg which reflects the problem that we have in deciding whether or not such claims are assignable. It held that a claim survived the death of the claimant and did not abate by his death but was assertable by his estate.

I go further. There is a decision by Judge Dimock, in the ILGWU case, which seems to imply that under certain circumstances a retirement fund which assigned a body of assets to the union of which it was a retirement fund could include in that body of assets any 10(b)(5) claims with which certain of those assets were weighted. And that is where the doubt arises.

But all of the indications go to the question of whether you can save from extension a 10(b)(5) claim which is assigned either by operation of law through testacy or is assigned in conjunction with a merger or consolidation of assets of the assignor into the assignee.

There is no case that Mr. Pollack can cite to you of a raw, naked assignment for the purpose of prosecuting the claim assigned under 10(b)(5). And it is to that issue that I addressed my earlier remarks, and it is to that issue that I say that the policy of the Securities Law in fact sets its face contrary. Because the whole point of the Securities and Exchange Acts, as I read them, is to foster disclosures, and if what this Court sets about doing is creating a new set of rights in securities that can be purchased and sold, then what are we to say about Allen & Company's obligations of disclosure at that point? There is no case that sets up, as I put it before, a market in 10(b)(5) claims. There are cases in which 10(b)(5) claims passed unscathed through general assignments by operation of law, consolidation or merger.

But I urge this Court not to engraft on those cases another exception which would have the effect of having brokers go out and solicit back from customers, who are unhappy with that, claims which they can then go out and assert against persons who are privy to private or public placements years before.

THE COURT: I will reserve decision.

MR. CRACO: May we have a brief recess, your

Honor? I would like five minutes.

THE COURT: How long will we be tomorrow? Maybe we can recess for the day? Can you finish this case tomorrow?

MR. CRACO: I hope we can.

THE COURT: We have been hoping here for some time. It is unfortunate.

MR. CRACO: Judge, I intend to call Mr. Lipkin, Mr. Boyer briefly and Mr. Chasen.

THE COURT: Maybe we could --

MR. CRACO: My present belief is I will recall Mr. Moyer for cross-examination, and it is my confidence that we will conclude the case tomorrow.

THE COURT: We'd better work a little later, then, tonight. We will take a short recess.

(Recess.)

THE COURT: Proceed.

MR. CRACO: Your Honor, for the sake of the record, at this time I renew my motions to dismiss with respect to Mr. Herzfeld, the plaintiff in chief.

THE COURT: I reserve decision.

MR. CRACO: Shall I proceed with my case, your Honor?

I call Richard Firestone to the stand.

R I C H A R D M. F I R E S T O N E, called as a witness on behalf of the defendant Laventhol, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CRACO:

Q Mr. Firestone, where do you reside?

A At 39 East 75th Street in New York.

Q What is your business and where is it located?

A At 375 Park Avenue.

Q What is the name of your business?

A Multi-National. We are in corporate financing and leasing.

THE COURT: Would you keep your voice up, please, Mr. Firestone? I am having trouble hearing you. The acoustics are terrible.

Q How long have you been in that business?

A About a little over two years.

Q Prior to that time, were you the Firestone of the Firestone Group, Ltd.?

A Unfortunately, yes.

Q How long had you been the principal of the Firestone Group, Ltd.?

A From its inception, and I believe that was about 1968.

Q Are you testifying here today pursuant to a subpoena served upon you on October 23, 1973, calling for your appearance on that date and such adjourned dates as might be appropriate?

A Yes.

THE COURT: How old are you, Mr. Firestone?

THE WITNESS: 43.

Q Mr. Firestone, would you describe for the Court what the business of the Firestone Group, Ltd. had been during the period from 1968 until the end of 1969?

A That you understand the Firestone, we really went into business in 1965, and at the time that Allen & Company entered the picture, approximately 1968, we changed the name from the Firestone Group to the Firestone Group, Ltd.

But we continued essentially the same type of business. And our business was the acquisition of land and income-producing properties and the resale of those properties primarily through syndication but sometimes through private sales.

Q You mentioned when Allen & Company came into the scene. When was that and in what way did they come into the scene?

A About 1968.

Q And what did did youget introduced to Allen & Company?

A We were introduced through a man named Ray Harvey, who introduced us to Allen & Company. And he told us that Allen & Company was looking -- were looking for real estate operations, were interested in real estate operations on the West Coast, and he thought we might have some mutual interest, the possibility of our going public, being taken public by Allen & Company.

Q Did he introduce you to any particular person at Allen & Company?

A Yes, he did.

Q To whom was that?

A Lee Meyer.

Q When was that?

A I guess that was '68.

Q Turning for a moment to the nature of your business, would you describe for the Court what is involved in the land syndication business as you conducted it in the Firestone Group during 1968 and 1969?

A Typically, we would contract to buy a piece of property at -- they might run from as small as a hundred acres to as large as 10,000 acres -- we would contract to purchase the property. We would then file an applica-

tion with the Corporation Commissioner of the State of California to sell it to a partnership, which we would set up, and then we would solicit the investors for the partnership.

THE COURT: A limited partnership?

THE WITNESS: I'm sorry?

THE COURT: Was it a limited partnership?

THE WITNESS: Yes. I'm sorry, I'm a little hard of hearing, sir. I have acoustic problems, too.

MR. POLLACK: I cannot hear him very well, if the Court please.

THE COURT: Can you move over?

MR. CRACO: I will be glad to yield my seat to you, Mr. Pollack.

Q Do try to keep your voice up, Mr. Firestone.

A I will.

THE COURT: Before you unpack your briefcases tomorrow morning, I will see if we can move into a smaller courtroom, if there is one available.

Q Mr. Firestone, about how many of these syndications would you say you had consummated prior to November of 1969?

A I say about 25 or so.

Q Had you negotiated with respect to others?

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A Oh, yes, with respect to many others.

Q As a result of your practical experience in this respect, did you become familiar with the custom and usage in California with respect to when persons dealing in the purchase and sale of land for investment regarded their transaction as having been effected?

MR. POLLACK: Objection, your Honor.

THE COURT: Overruled.

A Yes.

Q Would you describe to the Court what that custom and usage was?

MR. POLLACK: Objection, your Honor. I think this is self-serving.

THE COURT: Overruled.

Custom and usage usually is self-serving.

A In the cases of the larger syndicators, and we were, I guess, the largest, there was always an oversupply of money, and an undersupply of property, and once the -- once we had gone to escrow with the property, we considered it sold.

There was never a time that I remember prior to '68 that we were not oversubscribed, and the same thing went for every large syndicator that I knew in Southern California.

MR. POLLACK: I move that his answer be stricken.

THE COURT: Denied.

Q When you say you went to escrow, do you mean the point at which the contract for the acquisition of the property by Firestone, or a syndicator in a similar position, was executed?

A We considered it -- well, on the syndications we actually considered it at the time that it cleared the Corporation Commissioner's office, which was after the contracts had been signed.

MR. POLLACK: Your Honor, I don't want to interrupt here, but may I have a continuing objection and also some clarification as to who the "we" is that Mr. Firestone refers to in his answers?

THE COURT: The objection is there to the form of the question.

MR. CRACO: Have you ruled?

THE COURT: Yes, I think we all would like to know who "we" is, or are.

Q What I'm asking about at this point, Mr. Firestone, is the general pattern of conduct in respect to trading in land in California at that time, which you said you were familiar with. Is it fair to say that it was the custom and usage in California at that time, in respect of such syndications, that the purchasers and sellers of property regarded the deal as struck when they had gone to contract on the point.

MR. HAIMOFF: If your Honor please, I don't know what that means, "regarded the deal as struck."

Does that mean there was a custom and usage that title had passed? What's he talking about? I object to the question as wholely ambiguous, your Honor, and misleading.

THE COURT: Sustained. You could save a lot of time if you say I object to the form of the question.

MR. HAIMOFF: Yes, your Honor.

O You said that you recognized the custom and usage, that you were familiar with the custom and usage in California with respect to the consummation of land transactions, isn't that true?

A Yes.

O Now, what was the effect under that custom and usage of going to contract?

A What do you mean by "going to contract"?

MR. POLLACK: Objection to the form of the question, your Honor.

THE COURT: I think so. It's indefinite.

O Would you describe what effect the custom and usage in California accorded to the act of executing the contract for the syndication of a piece of property?

MR. POLLACK: Objection to the form of the question.

THE COURT: I think so. Sustained.

MR. CRACO: If your Honor please --

THE COURT: I will let you put a leading question.

MR. CRACO: All right.

O Was it the custom and usage in California that when the parties had executed a contract for the purchase of land for investment purposes, that the deal as between the

parties to the transaction was regarded for all practical purposes as closed.

MR. POLLACK: Objection to the form of the question. Mr. Firestone is not here, as I understand it, testifying as an expert.

Furthermore --

THE COURT: Overruled. He's testifying to the custom and usage in California.

MR. HAIMOFF: May I be heard on this, your Honor? Because it seems to me it is rather important.

The witness has testified that the transactions that he engages in involve sales by Firestone Group, or whatever the name of the company was, to a partnership which is set up by Firestone Group, of which I assume Firestone Group is the general partner, and then he says there are available thousands of subscriptions, they are oversubscribed.

Now, if what he means is that when he goes to contract, since he and a company or a partnership that he organizes are both parties to the same contract, that therefore for all practical purposes he regards the transaction as closed for that purpose, then I have no objection.

I don't know what it means, but I have no objection to it.

THE COURT: You don't know what contract he is

talking about.

MR. HAIMOFF: That's exactly my point.

Q I'm talking about the contract of the acquisition of 100 acres, or 10,000 acres.

THE COURT: Try it again. It's always easier on cross, Mr. Craco.

MR. CRACO: It is. Especially when you are dealing with what is really an adverse witness.

Q Mr. Firestone, when a buyer and seller of the property for investment purposes, in your experience in California, had gone to contract, by which I mean that they had both executed the contract for the purchase and sale of the property, did they, under the custom and usage prevailing in California at that time, regard themselves as bound by that transaction?

MR. POLLACK: Objection to the form of the question. Also the relevance.

THE COURT: Overruled.

Q May I have an answer?

A I can only answer for our company, and for other syndicators that were --

Q That's what I'm asking about, the custom and usage on the syndication.

A It was regarded as a deal that was completed and

it would be consummated.

O Thank you.

MR. HAIMOFF: If your Honor please, the question, as I understand it, is that when parties execute a contract they regard themselves as bound by it.

Now, I don't know what is peculiar custom and usage about that. That's true all over the Anglo American world, your Honor, it's true here, and it's even true in continental law.

THE COURT: I suppose it is.

MR. HAIMOFF: I don't know what it adds to the case.

MR. POLLACK: Your Honor, is he talking about as an accounting matter, as a legal matter or what?

MR. CRACO: As a matter of custom and usage in California.

THE COURT: I thought the question was perfectly clear.

MR. CRACO: I'm not going to argue the point, your Honor.

THE COURT: I don't know you should. You've got your answer. Go to the next question. I don't know what these arguments are about. I don't understand them.

O Did there come a time when you entered into negotiations on behalf of the Firestone Group with

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representatives of the Monterey Nursing Home?

A Yes.

Q When was that?

A I guess the early fall or late summer of '68.

Q With whom did you conduct those negotiations?

A Abramowitz, who was either the president or chairman of the board of Monterey.

Q Would you describe, please, to the Court, the course of those negotiations through the summer of 1968 or 1969 -- of '69 and the fall?

A Was it '68 or '69?

Q I'm sorry, I misspoke. '69.

A Is it '69?

Q Yes. You tell me.

A I don't know. It's either '68 or '69 and it was either late summer or early fall that I guess they began.

I met the president of Monterey, Abramowitz, in the offices of Cantor, Fitzgerald. They were an investment banking firm in Los Angeles, and I was introduced by the head of the corporate financing, a Mr. Ginzburg, and we began the negotiations then to buy all or most of the nursing homes of Monterey.

Q Did those negotiations proceed thereafter for a period of time?

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A Yes, they did.

O How frequently during the course of that time would you say that you were in contact with Mr. Abramowitz, if you can estimate?

A I really don't remember, but --

O Was it frequsntly?

A I would say frequently, yes.

O Did you discuss the nursing homes that were to be acquired?

A Yes, we did.

O Did you discuss the price for which they would be acquired?

A Yes.

O Did you discuss whether or not there were leases on the properties?

A Whether the property was owned and free by Monterey? Yes.

O Did you discuss whether there were arrangements by which tenants leased the property from Monterey?

A Yes, I'm sure we did.

MR. POLLACK: Your Honor, I object, A, on the grounds that all of these last five or six questions have been leading. Also, I object on the grounds it is hearsay. We have no way of verifying these conversations that he

allegedly had.

MR. CRACO: As to the latter, I'm asking about conversations that he participated in as part of simply establishing that they were held.

THE COURT: Yes. You are leading the witness, though.

MR. CRACO: On the other hand, your Honor, the witness has until lately been a third party defendant in this litigation and conceivably could be again. I will try to avoid it whenever possible.

MR. POLLACK: I don't believe the witness was ever a third party defendant. He becomes one if and when an action is commenced against him, and there was no such action.

THE COURT: Try to avoid the leading.

Q During the period of your negotiations with Mr. Abramowitz, did you enter into any discussions with a view towards the disposition of theproperty?

A Yes, we did.

Q With whom did you have those discussions?

A We had them with several people, among them was Max Ruderian.

Q Who were the others?

A I don't remember.

Q Did you pursue the transaction very far with any of the others?

A I don't think so.

Q Did there come a time, then, when your discussions centered on Mr. Ruderian insofar as the disposition of the property was concerned?

A Yes.

Q When was that?

A Sometime in the fall.

Q In the early fall or late fall?

A I don't remember.

Q Was it during the course of your negotiations with Monterey?

A I'm sure it was.

Q How long had you known Max Ruderian?

A For about two or three years.

Q In what connection had you known him during that period of time?

A In a business connection.

Q What kind of business connection?

A Well, to give you a little background on Ruderian, he was considered --

MR. POLLACK: Objection, your Honor.

THE COURT: Sustained.

Q Let me ask you to confine your answer, if you would, to what your business connection with Mr. Ruderian was.

A I see.

We in the Firestone Group had tried to do various transactions with him. Some involved buying property already owned. He was a very large holder of land.

Q I can't hear you now.

MR. POLLACK: Objection.

A He was a very large holder of land in Southern California, and also of income properties. There were times we attempted to buy from him, there are times we attempted to interest him in joining syndication in our properties that we had or in buying them outright.

MR. POLLACK: I move that the answer be stricken as not responsive.

MR. CRACO: I think it is directly responsive.

THE COURT: Denied.

Q Did you at the time that you were dealing with him in these connections know of Mr. Ruderian's reputation in the community as being a man of substance.

MR. POLLACK: Objection, leading.

Q With respect to whether or not he was a man of substance?

A Yes.

Q Would you describe to the Court what that reputation was?

A His reputation -- Ruderian's reputation was that he was very wealthy.

MR. POLLACK: Objection, hearsay, your Honor.

MR. CRACO: I'm asking for reputation evidence.

THE COURT: Overruled.

Q Were you familiar with his reputation with respect to whether or not he met his commitments in his business transactions?

A As far as we understand, he had an excellent reputation for meeting his commitments.

Q Were you aware of his reputation in the syndication of land industry, if I can call it that, in California?

A He was considered as one of the most --

Q Just tell me yes or no first. Were you aware of his reputation?

A Yes.

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Q Would you tell the Court what his reputation in that capacity was?

A He was considered as one of the founders of the industry and one of the more successful practitioners and one of the wealthiest and also he had one of the best reputations, I guess you would call it, morally. Really, no one ever had anything bad to say about him. No one ever claimed that they had ever been cheated of anything by Ruderian.

MR. POLLACK: Objection, your Honor. This is all rank hearsay.

THE COURT: Overruled.

Q In the course of your dealings with Mr. Ruderian, did you have occasion to use him as a source of funds?

A I'm sorry. I didn't hear you.

Q Did you use him as a source of funds?

A Did we ever have an opportunity to use him?

Q An occasion.

A We had never consummated a transaction with him, but we had tried.

Q So, there came a time, then, when you began negotiations with Mr. Ruderian with regard to the disposition of these properties.

Would you describe to the Court the course of

those negotiations?

A I must say I remember very little about them except that we approached him with the properties. Whenever we had a property and if we had -- we felt we had an opportunity to sell it without syndicating it, we would try that first because it was the easiest route, and we approached him with these properties and he was very interested in them and it was the height of the mania to acquire nursing homes, supposed to be the hope of the future, which was prior to Four Seasons, and he was very interested and we went into negotiations.

He was interested in the size and in the information we were able to give him about their earnings of these particular homes.

MR. POLLACK: Objection to what Ruderian was allegedly interested in, as hearsay.

Q Did he tell you this?

A He told us that.

MR. POLLACK: Hearsay objection, your Honor.

THE COURT: Overruled.

Q Did you meet with Ruderian personally in connection with this proposed transaction?

A Yes.

Q Where did you meet with him and how frequently?

A I don't remember how frequently, but we met at his office and at our office and both places and many times.

Q Can you tell the Court whether the negotiations were easy or not easy?

A The negotiations were not easy at all.

Q In what respect?

A Well, Ruderian was never satisfied with the transaction unless he was sure you were going to lose a little money. He was very hard.

I say he was a fair negotiator but a very tough negotiator and a very knowledgeable negotiator.

Q Did he apply, in your observation, this knowledgeability and toughness to the transaction that you were negotiating with him?

A Indeed, he did.

Q Going back for a second to the custom and usage in California very briefly, in transactions of the character that we are talking about here in this case, was it the custom and usage for the purchaser to put up any cash at the time of the contract?

MR. POLLACK: Objection, your Honor.

MR. CRACO: Take it subject to connection, if you please.

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MR. POLLACK: If he wants to testify about his practice that is one thing, but why should --

THE COURT: I'm quite aware, Mr. Pollack. I'll allow it.

Q Go ahead.

A I didn't hear the Judge.

Q You may answer.

A I have to qualify the answer by saying what our custom was and what mostof the syndicators' customs were.

Q Tell us both.

A Our custom was to put up little or no cash.

Q Do you know what the custom generally was?

A It depends what kind of property you were buying and in what quantities.

Q With respect to the purchaser from you, was it customary for the purchaser to put up cash at the time that they signed the purchase contract?

MR. POLLACK: Objection. Which purchaser?

THE COURT: I'm afraid you are skipping through. We are going to syndicate it, aren't we? You are kind of jumping back and forth.

Q In the course of these negotiations with Mr. Ruderian, did the issue come up as to whether or not you were going to require Ruderian to put up cash?

A Yes.

Q What was his response?

A A painful scream.

Q At the risk of leading, did he tell you that it was unheard of and that he wouldn't do it?

MR. POLLACK: Objection. Hearsay.

Q Did he tell you that? Did he tell you that in words or substance?

A In substance he --

THE COURT: What did he say?

A In substance, he said, "You know, I said I never put up cash, you never put up cash. We are all in this business. I have never, you have never known me to back out of a deal. I didn't know you to back out," et cetera. I don't remember why we were so insistent on him putting up cash at least as a token.

I think it was really because he was a very important potential buy for us and it would have been a very important syndication and keeping it off the syndication market ran a risk for us and we wanted to be certain that we had a deal with Rudorian. Otherwise, we would have taken it through the regular syndication route and it was a particularly, a sensitive time of the year, because most of our syndications took place in the last

quarter of the year because so many investors came in for tax purposes in addition to the investment reasons, and we needed lead time to get it through the Corporation Commissioner's office and if we were going to hold it the away from syndication for any amount of time, we might not have syndicated it at all that year.

So, we wanted to be sure that we had Ruderian, in spite of his reputation, excellent reputation. We wanted to be sure we had him tied in as much as possible.

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Q Did you explain all of that to Ruderian?

A Oh, sure.

Q In addition to the cash in the course of these negotiations, was there any discussion about a penalty or liquidated damages clause in the contract?

A Yes, there was.

Q Would you tell us the substance of that conversation?

A Well, the substance was we wanted a lot more than $25,000 and I don't remember what we asked for, what we opened with but by a process of negotiation it came, we finally settled on the $25,000 in cash and penalties.

Q Well, for the sake of brevity, were the same considerations that you testified to a moment ago the considerations that moved you to request that clause?

A Yes.

Q In the course of time, was there a contract in fact executed between the Monterey Nursing Inns and the Firestone Group?

A Yes.

Q I show you Plaintiff's Exhibit 22 on this trial and ask you whether that is a copy of that contract?

A I imagine so.

Q Well, I ask you to --

A That' is my --

Q I ask you to look at the third page of the exhibit and I ask you whether your signature appears on the document?

A It does.

Q And do you recognize the signature under Monterey Nursing Inns?

A No.

Q To the best of your recollection, is this a copy of the contract that was involved?

A I suppose it is. I mean I just --

Q I show you Exhibit 21 in this trial and I ask you whether this is the contract that was ultimately entered into between you and Continental Recreation Company, Ltd. You can look at the signature page.

A It seems to be.

Q Does it bear your signature?

A It doesn't look much like my signature but it looks something like it.

Q Well, is it your signature? Can you identify your signature?

A I am really not sure it is my signature.

Q Well, look at the exhibit and tell the Court, if you can, whether that is in fact the contract that you

entered into?

A It looks like it would have been the contract.

Q Now, I know that the contract which is Exhibit 23 is with Continental Recreation.

In the course of your discussions with Mr. Ruderian, did the subject of that corporation ever come up?

A I imagine it did.

MR. POLLACK: Objection to what the witness imagines, your Honor.

THE COURT: Overruled.

Q Do you recall any conversations about the corporate form in which the purchase would be effected?

A I don't remember.

Q In the course of the negotiations did it or did it not make any difference to you which of Mr. Ruderian's corporations purchased the property?

MR. POLLACK: Objection, your Honor.

THE COURT: What ground?

MR.POLLACK: It seems to me that it is just asking the witness to give a self-serving answer in line with some previously arranged responses.

THE COURT: Overruled.

MR. CRACO: I won't respond to that.

Q May I have an answer? Maybe the witness better have

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the question read back.

THE COURT: Did it make any difference which of the Ruderian companies bought the property?

Q To you.

A No.

We felt we were dealing with Ruderian.

Q In this transaction, is it your best recollection that you had legal assistance in the preparation of the transaction?

A Yes.

Q And whose legal assistance was it your best recollection you had?

A It was either Milbank, Tweed in New York or Pacht, Ross, in Los Angeles.

Q Now, during the course of negotiations of this, both with Monterey and with Ruderian, did you have occasion to speak from time to time to Lee Meyer?

A Yes.

Q And in the course of those conversations, would you tell us whether or not you acquainted Mr. Meyer with the status of the transactions when you spoke to him?

A Yes.

Q And about how frequently would you say you spoke with Mr. Meyer during the period of the summer of 1969 and

the early fall?

A Well, it's hard to say. Sometimes we wouldn't speak to each other for an entire week and there were times we would speak every day.

Q And in the fall of 1969, was the Monterey-Ruderian transaction the most significant piece of business that Firestone was doing?

MR. POLLACK: Objection.

THE COURT: Overruled.

A It was the largest single transaction.

THE COURT: We will take our recess now until tomorrow morning at 10:00 o'clock.

(Adjourned until 10:00 a.m. October 26, 1973.)

WITNESS INDEX


| Name | Direct | Cross | Redirect | Recross |
|---|---|---|---|---|
| George M. Duff (Resumed) | 399 | | | |
| Maurice Goodman | 439 | 442 | | |
| Leo W. Meyer | 447 | 452 | | |
| Richard M. Firestone | 512 | | | |


EXHIBIT INDEX


| Defendant | Identification | In Evidence |
|---|---|---|
| A-23 | | 403 |
| A-24 | | 409 |

Gerald L. Herzfeld

791a

vs

71 Civ. 2209

The Firestone Group, Ltd., et al.,

New York, New York
October 26, 1973 - 10:15 a.m.

(Trial resumed.)

MR. POLLACK: Your Honor, our witness flew in from California. He hasn't had any sleep and wants to go home. May we put him on for five minutes? I don't think it will take long.

THE COURT: Sure.

MR. CRACO: On that representation, I have three witnesses who did the same thing.

While he approaches, your Honor, may I indicate to the Court that pursuant to the arrangement arrived at in open court yesterday, I concluded overnight that I would not require further cross examination of Mr. Meyer and so informed him this morning.

THE COURT: Thank you, Mr. Craco.

(Witness called.)

ROBERT SCOTT JEPSON, JR.,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POLLACK:

Q Mr. Jepson, please state your occupation?

A I am an investment banker.

Q For whom do you work?

A Cantor, Fitzgerald & Co., Inc.

Q In what capacity?

A I am vice-president of corporate finance.

Q What is your educational background?

A I have a Bachelor of Science in business administration, business economics from the University of Richmond in Virginia; Master of Commerce from the same institution.

Q Have you been engaged in the appraisal of stock of closely held corporations?

A Yes, I have.

Q Please tell the Court your experience in that field?

A For the past three years, I've been making appraisals for individuals and corporations, these appraisals have been used in municipal courts and other such courts in the Los Angeles area.

During the past three years I've appraised approximately 300 million in corporate assets.

Q Approximately how many appraisals have you . . . .

participated in or supervised in the past three years.

MR. CRACO: Excuse me, your Honor. Do I understand that Mr. Jepson is being offered as an expert on the value of the preferred stock of the corporation because if that is the purpose of his offering, I will dispense with further elaboration of his credentials to offer that opinion.

If he is being offered for some other purpose that I don't know of, then maybe I have to --

MR. POLLACK: We are offering him for a fact witness on the approaisal as to the value, and I mean the value of the stock and also, I think he probably has expert qualifications.

MR. CRACO: I waive any further reading of the qualifications in order to expedite matters.

THE COURT: All right.

Proceed.

Q Did you have occasion to make a valuation of the preferred stock of the Firestone Group, Ltd. as of October 1, 1971?

A Yes, I did.

Q What valuation did you place on the preferred stock?

MR. CRACO: Excuse me, your Honor. May we have a foundation laid as to in what capacity he did that

on how he went about it, before we get the bare information.

THE COURT: I think it's customary to take it the other way.

Proceed.

Answer.

Q What valuation did you place on the preferred stock of the Firestone Group, Ltd. as of October 1, 1971?

A I believe it was a $1.07 a share.

Q Did you make a valuation of the common stock of the Firestone Group, Ltd. as of October 1, 1971?

A Yes, I did.

Q What valuation did you place on the common stock?

A I believe I gave the common stock a value of zero.

Q Did you testify to your conclusion in the Federal Court in California?

A Yes, I did.

Q On what factors did you base your valuation?

A The evaluation was based on the book value for the corporation as of the early spring of 1972, using that as a base, we worked backwards for the October '71 valuation. The preferential rights of shareholders was a major consideration. The cash position of the company at that time was a major consideration.

Q Did you make a written or prepare a written

statement in connection with your evaluation?

A Yes, I did. It was submitted to the Federal Court in Los Angeles.

Q Do you have it with you?

A No, I do not.

Q Would you have any objection to making it available to the Court immediately upon your return to California?

A Be more than happy to.

MR. CRACO: However, I would have an objection to its admission.

We have the witness' testimony.

THE COURT: Yes, I think so. Let's have the witness' testimony. You can't very well put something in evidence after he goes back to California and the case is over, Mr. Pollack.

MR. POLLACK: I merely offered it as a convenience.

THE COURT: You haven't got it here to offer. Let's get his testimony.

MR. POLLACK: Yes, sir.

Q Do you know Lee Meyer?

A No, I do not.

Q Do you know Allen & Company, Incorporated?

A I only know the name. I do not know any of the people employed by the company.

Q Do you know Richard Firestone?

A No, I do not.

Q Do you know the Firestone Group, Ltd.?

A Only in connection with the appraisal.

MR. POLLACK: No further questions, your Honor.

CROSS EXAMINATION

BY MR. CRACO:

MR. CRACO: Preliminary to a very brief cross, your Honor, I should like to move to strike the testimony in its entirety for the sake of the record on the ground that it is immaterial and offer just very rapidly two points.

First, it seems to me the testimony yesterday and unfortunately we don't have a transcript for me to refer to the exact page, was that there came a point in the reorganization when Allen & Company, Incorporated had an option, had a choice to take the preferred stock or to take some other route. We have had no testimony as to the basis of its decision to take the preferred stock, so in the absence of that connection and some proof as to the reasonableness of the exercise of that choice, this testimony, I submit, has not been properly grounded.

Secondly, as a matter of law, I take the position that since this testimony is offered on the issue of damages, that the damages of Allen & Company, Incorporated, are

circumscribed by the doctrine of Reno against Bull to the actual out of pocket loss of the alleged victim of the fraud, assuming there were one and that this testimony does not go to that point but I just wanted to make that motion at this time for the record.

THE COURT: I'll just deny it at this time for the record.

Q Mr. Jepson, at whose instance did you prepare the appraisal which you have indicated you prepared?

A Buchalter, [illegible]er, Fields & Savitch, a law firm in Los Angeles.

Q Whom, if you know, did they represent in the reorganization proceeding?

A I believe they represented Transcontinental Resources.

Q And is Transcontinental Resources to your knowledge the successor corporation to the Firestone Group?

A I believe it is.

Q Were you given any instructions as to the method of your valuation or the results of your valuation?

A No. I was just asked for the evaluation and submitted it directly to the Court.

MR. CRACO: No other questions.

THE COURT: Mr. Haimoff?

MR. HAIMOFF: I have nothing, your Honor.

THE COURT: You are excused.

(Witness excused.)

MR. CRACO: May I proceed, your Honor?

R I C H A R D F I R E S T O N E, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. CRACO (Continued):

Q Mr. Firestone, did there come a time when a question arose concerning the accounting treatment to be accorded the Monterey-Ruderian transaction?

A Yes.

Q Do you recall when that was?

A Toward the end of 1968.

Q 1968 or 1969?

A Whichever year.

Q Well, I show you Exhibi5 3, the note and stock purchase agreement and draw your attention to the date on it?

A It must have been '69.

Q Does that refresh your recollection that we are talking about '69?

Now, with that in mind --

MR. POLLACK: Did we have an answer?

A '69.

MR. CRACO: I thought we did.

Q Now, with that in mind, you place this problem in the latter part of 1969, is that correct?

A That is correct.

Q Was it during the course of the audit that was being performed by Laventhol, if you recall?

A Yes.

Q Would you tell the Court who raised a problem about the accounting treatment to be accorded this transaction?

A Someone at Laventhol. I don't remember what particular person there.

Q Was it you?

A No.

Q Is it your testimony that the issue of the appropriate accounting treatment was raised during the course of the audit by Laventhol?

A That is correct.

Q And was it raised with you personally?

A Was it raised with me personally.

Q Yes.

A Yes.

Q In the course of the conversation?

A In the course of a conversation? I didn't hear your question.

Q I am sorry. Was this problem raised with you in the course of a conversation?

A Yes, I imagine.

BY MR. CRACO:

Q Would you tell us, as best you can recall, what was said by the Laventhol representative and by you in connection with this issue at that time.

MR. POLLACK: Objection, hearsay.

THE COURT: Overruled.

MR. HAIMOFF: May we have a date, your Honor?

THE COURT: Yes, fix the time and place.

Q Where did this conversation take place?

THE COURT: And the person.

MR. CRACO: I attempted to do that.

Q Do you recall where this conversation took place?

A No, I don't recall where -- it probably took place in my office.

Q And you fix the time as during the audit by Laventhol?

A Yes.

Q Would it refresh your recollection if I were to ask you if you had the conversation with Mr. Arnold Lipkin?

A I don't remember whether it was Mr. Lipkin or someone else there.

Q Would you tell us the substance of the conversation?

A The substance was -- the question was raised by Laventhol on how to treat this. I intended to treat it as

all income. When I say I had intended to treat it, we at Firestone Group thought it was going to be just all income.

Q When you say all income, do you mean all income in the period ending November 30, 1969?

A That is correct. And I don't know what their proposal was. They wanted to know more about the transaction. And they requested -- I forgot what documentation they requested, but, if I remember, as well as I can remember, it was all the documentation we had, which we then gave them. And I don't remember what their proposal was at that time, how they wanted to treat it.

We wanted to treat it all for profits in that accounting period. And I was in the conversations and Mr. Scott and Mr. Scharff were involved in the conversations. I think later on Lee Meyer might have been in on some of the conversations by telephone. He was in New York at the time.

Those were the people that were involved, and I think Mr. Wadley was probably involved in those conversations.

Q I took it from your conversations that there were more than one conversation on this point?

A Yes, there was a series of conversations.

Q In the course of those conversations, what position did you and Mr. Scharff and Mr. Wadley take?

A I don't remember if Mr. Wadley --

MR. POLLACK: Objection. It's compounded.

MR. CRACO: Let me reframe it to avoid the objection.

Q Did the person necessarily of the Firestone Group, Ltd. have a position which they urged upon Laventhol in the course of these conversations?

MR. POLLACK: Objection to the form of the question.

THE COURT: Overruled.

A Yes, they did.

Q What was that position?

A The position was that it was a sale and we wanted to take it all as income in that accounting period.

Q In your presence, did Mr. Meyer take a position on that matter?

A Mr. Meyer was not in Los Angeles at the time.

Q Well, did you hear him take the position in the course of these conversations on this point?

A I spoke to Mr. Meyer about it on the telephone and he took that position, also.

Q Well, would you describe, please, when that conversation took place, as best you can?

A It took place during the time of the discussions with Laventhol over the question.

Q And this is all during the audit period?

A All during the audit period, yes.

Q And you had a conversation yourself with Lee Meyer on this point?

A Yes.

Q Would you tell us, as best you recall, what you said to Meyer and Meyer said to you on that occasion?

A Simply, I said to Meyer, I told him that Laventhol had questions how they wanted to handle it. I told him how we wanted to handle it.

Q What did you tell him about Laventhol's position and what did you tell him --

A I don't remember what Laventhol's position was at the time. The question was, that Laventhol raised, was whether to take it all as income in that accounting period or to take none of it or take part of it. I don't think there was any question of none. It was just whether to take part or all or how to handle it.

Q And you relayed that information to Mr. Meyer?

A Yes.

Q What did Mr. Meyer say to you?

A Mr. Meyer agreed with the position that we as a company were taking.

Q What did he say, as best you can recall?

A Simply that he agreed with it, based on the facts he had.

Q Based upon those facts, do I understand your testimony to be that he agreed that the entire amount should be taken into current income at that time?

A That was his feeling at that time.

Q And he communicated that feeling to you?

A He did.

Q In this conversation?

A That is correct.

Q Was the problem eventually resolved?

A Yes, it was.

Q Did your position prevail or Laventhol's?

A Well, our position certainly didn't prevail. I don't remember whether this -- the way it was finally handled was Laventhol's opening position, or exactly what the story was, but it was not what we thought we should have, or, you know, not the position we had originally taken. And by "we," I mean the people at the Firestone Group and myself.

Q Is it correct to say that Laventhol refused to adopt your original position and didn't adopt it?

A That is correct.

Q I show you Plaintiff's Exhibit 3 in evidence,

the stock purchase agreement, of November 10, 1969, and I ask you whether this document on page 14 bears your signature?

A It does.

Q Did you read that document at the time you signed it?

A Yes.

Q I show you Plaintiff's Exhibit 6 in evidence, the letter of December 16, 1969, in this case, to Mr. Gerald Herzfeld.

MR. CRACO: I recall to the Court that Mr. Goodman yesterday testified that he received one substantially in similar form.

Q I ask you whether you have seen that document or similar documents before.

A Yes.

Q Did you sign it?

A Yes.

Q Does Exhibit 6 bear your signature?

A Yes.

Q Was that document prepared under your supervision?

A This is Exhibit 6? This is Exhibit 9.

Q I'm sorry. This is Exhibit 6 on the trial. It was Exhibit 9 on the pretrial examination.

A Yes, sir.

Q My question now is, did you read Exhibit 6 before you signed it?

A Yes, I did.

Q Was it in fact prepared under your supervision and with your approval?

A Yes.

Q Was Exhibit 6 and its contents prepared for the purpose of being sent to investors in connection with the private placement of this stock?

A Yes.

Q Do you know whether it was provided to Allen & Company, Incorporated, for that purpose?

A I don't understand that question.

Q Let me reframe it. In point of fact, did Allen & Company, Incorporated receive one or more copies of the document which is Exhibit 6?

A Yes.

Q When you executed Exhibit 6 and other similar documents, were the contents of that document true and correct to your best belief at the time?

A Yes.

MR. CHACO: No further questions of this witness.

THE COURT: Any cross examination?

MR. POLLACK: Yes, your Honor, just one moment, if I may.

CROSS EXAMINATION

BY MR. POLLACK:

Q Mr. Firestone, Lee Meyer didn't participate in your discussions with Mr. Ruderian, did he?

A No.

Q You didn't send Lee Meyer a copy of the contract with Continental Recreation Company prior to the time of the private placement, did you?

A I doubt it.

Q You didn't send Lee Meyer any other documentation of the transaction with Continental Recreation Company at any time prior to the private placement, did you?

A I don't think so.

Q Mr. Wadley was not involved in the discussions with Ruderian, was he?

A No.

Q To your knowledge, did Wadley even know about discussions with Ruderian as of the time of the closing of the private placement?

MR. CRACO: I object to this witness' characterization of the other witness' state of mind.

THE COURT: Sustained.

Q Did you tell Wadley anything about your discussions with Ruderian at any time prior to the close of the private placement?

A I'm trying to -- he knew about our arrangements with Ruderian. When you say did I tell him about discussions, I didn't tell him day to day what our discussions -- where they were. But Wadley knew all about the transaction.

Q Is it your testimony that he knew about the transaction prior to December 16, 1969?

A Oh, sure he did.

Q Can you testify to yourself ever having told him anything about the transaction prior to that date?

A I can't remember whether I, you know, directly told him, but just as a matter of procedure on almost any negotiation he would have been kept aware.

Q You have no recollection yourself, though, of having told him anything about the Continental transaction --

A I have no recollection either way, telling him or not telling him.

Q You testified on direct examination by Mr. Craco that you had been asked by Laventhol to give them all documents and papers that you had in connection with the sale to Continental and that you did give them all such papers; is that correct?

A That is correct.

Q Did you prepare Exhibit A-2, the contract with Continental Recreation?

A It was prepared under my supervision and I had to approve it, of course.

Q It was not prepared by Milbank, Tweed, was it?

A I don't know if this particular document was. I don't think so.

Q The execution of this agreement on November 26, 1969, was not supervised by Milbank, Tweed, was it?

A It may have been.

Q Do you have any affirmative recollection that Milbank, Tweed supervised the execution of this document on November 26, 1969?

A I don't.

Q Who at Milbank, Tweed would have done it, if anyone had done it?

A John Nelson was the partner in charge. It would have been him or his assistant. I don't remember his assistant's name.

Q Did Lee Meyer tell you that it was a condition of the willingness of Allen & Company, Incorporated, and the people who were purchasing through them, that there had to be an audited statement of Laventhol?

A Yes.

Q Did Meyer tell you that he wouldn't close without an audited statement from Laventhol?

MR. CRACO: May we fix the date of this supposed conversation?

THE COURT: Yes, could you fix it?

MR. CRACO: And the circumstances?

A I think -- I can't give an exact date of the conversation that they would need an audited statement, but I think it was at the very beginning of our relationship, which would have been early '69 or so. And there was, in answer to your second question, they would not close without it, I mean, there was never any discussion that it wouldn't be forthcoming.

Q But Meyer did tell you that he needed an audited statement from Laventhol in order to close, did he not?

MR. CRACO: I object to the form of the question.

THE COURT: Sustained.

MR. POLLACK: Your Honor, this is cross examination.

MR. CRACO: I recognize that it is, your Honor.

MR. POLLACK: I'm not addressing you, I'm addressing the Court.

MR. CRACO: I'm trying to address the Court, too, Mr. Pollack. I will continue, if I may.

I recognize that it is cross examination, your Honor, but it seems to me that in eliciting the substance of conversations, the circumstances of the conversations ought to be established whether on direct or on cross.

THE COURT: Well, I think you've got to set the conversation. Who was there? What was said?

And then you can lead all you want on cross examination.

Q Did Mr. Meyer tell you at any time that he had to have an audited statement in order to close?

MR. CRACO: Are you finished with yourquestion, Mr. Pollack?

MR. POLLACK: Yes.

MR. CRACO: It is the very same question and I pose the very sameobjection.

THE COURT: Sustained.

MR. POLLACK: First I have to establish when there was a conversation, then when --

THE COURT: I sustain the objection. I directed you how to proceed, and I suggest you follow it.

Q Mr. Firestone, you testified on your direct examination by Mr. Craco that you had had some telephone conversations with Mr. Meyer; is that correct?

A That's correct.

Q In the course of one or more of those telephone conversations, did he tell you that he had to have an audited statement from Laventhol in order to close on December 16, 1969?

A I don't think it was on the telephone conversation. I think it was in maybe one of the very earliest meetings we had.

THE COURT: I cannot hear you.

A I think it was -- it was not on a telephone conversation, it was told to me in one of the very earliest meetings we had at the beginning of that year.

Q In any event, is it fair to say that Meyer did tell you that he needed an audited statement from Laventhol in order to close?

A Yes.

MR. CRACO: Excuse me -- all right.

THE COURT: Mr. Pollack, would you get over here? You get next to the witness, you mumble, and I can hardly hear your questions. He mumbles back, and I cannot hear his answers.

Q Mr. Firestone, Lee Meyer was not an accountant, was he?

A He was not an accountant? No, he was not. Not as far as I know.

MR. POLLACK: No further questions, your Honor.

MR. HAIMOFF: I have no questions.

MR. CRACO: I have one, your Honor, a short series on redirect.

REDIRECT EXAMINATION

BY MR. CRACO:

Q This conversation that you had with Mr. Meyer back at the beginning of 1969, about the necessity of an audited

statement, was that a conversation that had to do with the plans then in progress for a public offering of the Firestone Group?

A It might have been. It might have.

Q Well, you fix the time as at the very beginning of your relationship with Meyer. At that time you you were contemplating a public offering, not a private placement, were you not?

A That's correct, but --

MR. CRACO: That is all. Thank you.

RECROSS EXAMINATION

BY MR. POLLACK:

Q Mr. Firestone, I believe you started to add something in your last answer. Would you care to complete your answer?

A Yes. It was just an implicit understanding that whatever we did with Allen & Company we would need an auditor's statement.

Q Was the sale to Continental Recreation Company ever consummated by the Firestone Group, Ltd.?

A It was not.

Q Did you ever collect the $185,000 liquidated damages?

A We did not.

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FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

Q Did the Firestone Group, Ltd. ever acquire the Nursing Inns from Monterey?

A We did not.

MR. POLLACK: No further questions, your Honor.

THE COURT: All right. You are excused.

(Witness excused.)

MR. CRACO: I would like to call Mr. Boyer. Some of these witnesses are not in the beautiful symmetrical order I would like, but they have plans, too.

THE COURT: I do not know if I can hear it in symmetrical order, either. I have a criminal pretrial on here when we have every assembled.

E L I B O Y E R, called as a witness on behalf of the defendant Laventhol, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CRACO:

Q Mr. Boyer, would you keep your voice up, please. Where do you live, Mr. Boyer?

A Los Angeles, California.

Q By whom are you employed?

A We like to use the word -- I'm part of the firm of Laventhol, Krekstein, Horwath & Horwath.

Q Are you a partner in the firm?

A I am.

Q How long have you been a partner in that firm?

A That and its predecessors, about 12 years.

Q Are you a Certified Public Accountant?

A I am.

Q Do you maintain your principal office in Los Angeles?

A I do.

Q Would you describe, please, to the Court what the nature of your responsibilities at Lavantho.., Krekstein presently are?

A I'm what might be called a back-up partner. I am involved in major accounts. In all of the accounts I am involved in, another partner is the direct partner on the account. I work on mergers and acquisitions. I'm on the National Council -- that is the same as a board of directors -- that runs the firm.

Q Is the firm a national firm?

A Yes, it is.

Q Is the National Council to which you adverted the board that governs the entire national firm?

A Yes. We have about 320 domestic partners and we have 15 on that board.

Q And you are one of those 15?

A Yes, I am.

Q Would you describe to the Court what your responsibilities were in the latter part of 1969 to the extent that they were different from what you have just described?

A They were the same as they are now.

Q Did there come a time when you learned in 1969 that Lavanthol was conducting an audit of the Firestone Group?

A Yes.

Q Do you recall when it came to your attention?

A I could only say that in my capacity in the office I'm aware of most of the more important audits that are going on, so that in that general course I certainly would have known about this audit.

Q Is it your best recollection that in your capacity you did in fact learn of it?

A Yes.

Q Did there come a time when a particular problem with the Firestone Group audit was brought to your attention?

A Well --

Q Yes or no first.

A Yes.

Q All right. Was that brought to your attention by another partner in Laventhol?

A Yes. I equivocated in my answer only because of the fact that when I was asked to be involved in this, it was not necessarily that there was a problem. My help was being solicited with respect to the audit that was then in process.

MR. HAIMOFF: May we have a date, your Honor?

THE COURT: Fix a date.

Q Do you recall approximately when your help was so solicited?

A Either the last few days of November or the first couple of days of December.

Q Of 1969?

A Yes.

Q By whom was this assistance requested?

A Arnold Lipkin.

Q Who was Arnold Lipkin at that point?

A He was one of my partners and he was the partner in charge of the Firestone Group audit.

Q Did you have a conversation with Mr. Lipkin in which he solicited your help?

A Yes.

Q Was that conversation at the time you just referred to?

A Yes.

Q Would you tell us what Mr. Lipkin said to you and what you said to Mr. Lipkin in the course of that conversation?

MR. POLIACK: Objection; hearsay and not binding on Allen.

MR. CRACO: Excuse me, your Honor --

THE COURT: Overruled.

Would you let me rule before you start argument?

B-2 MR. CRACO: Yes, sir.

A Mr. Lipkin came into my office and explained to me that the Firestone Group was involved in a very large acquisition that was part of the audit of the Firestone Group, and said that -- asked me if I knew Max Ruderian, who was one of the principals involved in connection with that transaction, and wanted to know from me if I could talk to Mr. Ruderian and verify the fact that the transaction that was under discussion was in fact the transaction, and that their part in connection with it was real and that they were parties to the transaction, I suspected.

Q Did you respond to Mr. Lipkin?

A Yes, I did. On that basis, I told him I would

call Max Ruderian, and I did.

Q We will come to that.

MR. POLLACK: Your Honor, may I have a continuing objection to his discussions with his partners?

THE COURT: Yes, you can have the objection.

You may proceed.

Q In point of fact, did you know Max Ruderian?

A Yes.

Q How long had you known him?

A Oh, I daresay eight or ten years.

Q In what capacities did you know him?

A I knew Max Ruderian in two capacities: I knew him as a very, very important syndicator or, I guess, syndicator of land transactions; and I also knew him socially and particularly with respect to charitable endeavors.

Q In connection with those charitable endeavors, were they charitable endeavors that you were associated with?

A Yes.

Q What charitable endeavors?

A The primary charitable endeavor was the Jewish Federation Council and the United Jewish Welfare Fund.

Q In those capacities, did you have occasion to

deal with Mr. Ruderian from time to time?

A On many occasions. I was an important fund-raiser and was an officer of the Federation Council. He was on the board of directors and was a very important giver. So that I would see him in both capacities.

Q In this capacity, did you come to know personally whether Mr. Ruderian was in fact a man of substance and means?

A Yes, I did.

Q How did you learn that in the course of this?

A Well, the best effort was the amount of money that he gave.

Q Did he give a lot of money?

A Well, they were varying amounts, as I remember, but I think in the last year, in the year 1969, I think he gave $50,000.

Q Did he give anything besides money?

A He also gave land and trust deeds. He was one of the most important givers in that year or the year preceding. I believe there was an anonymous gift, I mean, there was a gift by him and his partner which was very large, that by their own direction was not announced.

So that there was a footnote to their giving which merely stated that this was the largest gift, non-

cash gift, that had ever been given to the Welfare Fund.

Q To your knowledge, it was given by Rudorian?

A Rudorian and his partner, Albert Spiegel.

Q Over the years had you become acquainted with Mr. Rudorian's business reputation in the community?

A Yes.

Q Would you tell the Court what that reputation was?

A I could only tell you that they were considered one of the leading, if not the leading, land syndicators in the area, and I crossed their paths on a number of occasions; particularly I remember, in at least three or four instances, attorneys from New York would come and visit me because our office was known to have a number of clients who could be prospective investors in various types of -- various types of land ventures, and they were always -- not always, but in these instances they were promoting or becoming interested in syndication-sponsored -- or a part of a Spiegel-Rudorian operation.

MR. POLLACK: I move to strike all of this.

THE COURT: We will take a short recess at this point.

Your motion to strike is denied.

(Recess.)

3a

Q In your conversation with Mr. Lipkin, did you tell Mr. Lipkin substantially what you have now told the Court concerning Mr. Ruderian?

A Yes, I did.

Q Thereafter, did you make a call to Mr. Ruderian concerning the inquiry that Mr. Lipkin had posed to you?

A I did.

Q Can you tell the Court approximately when you made that call?

A As I indicated, either it was the last few days of November or the first few days of December. I don't remember the exact date.

Q Did you make the call from your office?

A I did.

Q Did you reach Mr. Ruderian?

A I did.

Q Do you recognize Mr. Ruderian's voice, so that you can be sure that it was him with whom you were speaking?

A Oh, yes.

Q Would you tell the Court what you said to Mr. Ruderian and Mr. Ruderian said to you in the course of that conversation?

MR. POLLACK: Objection. Self-serving.

THE COURT: Overruled.

A I called Mr. Ruderian in the presence of Mr. Lipkin and told him that our office were the accountants for the Firestone Group and wanted to know whether he was in fact involved in a possible purchase of a group of nursing homes.

He told me that they were very much involved, that they had a deal with the Firestone Group.

I told him that the main purpose of my call was, and I had to put it delicately because we were really trying to find out, really, the stability, the interest and their financial ability to be able to pursue the transaction -- he told me that, as I have indicated before, they had made this deal, that their reputation was well known to me.

He mentioned the fact that they had completed some 300 syndications; that they had never defaulted on any of them; that their reputation was their password; that they never went into anything that they didn't complete; and, that I should have no concern about their interest in this deal, their ability to complete it and the financial backing they had with respect to its final conclusion.

MR. POLLACK: Your Honor, I object again.

I renew my objection on the grounds of hearsay. The conversation is entirely self-serving.

In addition, I would like to have an identification of who the "they" is to whom Mr. Boyer continually referred in his previous answer.

THE COURT: Tell us who "they" is, first.

A The "they," Mr. Ruderian was involved in a partnership with Mr. Albert Spiegel, and the "they" referred to Max Ruderian and Albert Spiegel.

THE COURT: I will take it for the fact of its being said but not for the truth of it, at all. It is plainly hearsay on that score.

MR. CRACO: I am only offering it for that purpose, your Honor.

Q Let's be precise about this for a second, Mr. Boyer.

Had Mr. Lipkin asked you to assist him in making an audit check of the contract which Mr. Ruderian's company had entered into with the Firestone Group?

A Yes.

Q And were you in fact making such an audit check in your call to Mr. Ruderian?

A Yes.

Q Did you in substance tell Mr. Ruderian that?

A Yes.

Q And in the course of that audit check, that confirmation of the contract, did you attempt to elicit from Mr. Ruderian whether in fact he had executed such a contract?

A Yes.

Q And what did he say?

A He stated that they had.

Q Did you attempt to elicit from Mr. Ruderian whether he regarded the contract as binding upon his company?

MR. POLLACK: Objection.

A Yes.

MR. POLLACK: It is leading and hearsay.

THE COURT: Overruled.

MR. POLLACK: May we not have it in the form of what did he say to you and what did you say to him?

MR. CRACO: I put it in that form and it was objected to.

THE COURT: No. It's all right. Go ahead.

Let's not run a debate here. I ruled on it. Overrule the objection.

If you want to have an argument with Mr. Pollack, go out in the street. You can argue all day. Don't bring

your business in to me.

MR. CRACO: I am confident we could, and I will avoid it, your Honor, in the future.

Q Do you remember the question, Mr. Boyer, or would you like it read back?

A I thought I answered the question.

THE COURT: Whether he thought the contract was binding.

A My answer was yes.

Q Did you discuss with Mr. Rudorian his intention to go forward with the contract in accordance with its terms?

A Yes.

Q What did he say in connection with your inquiry in that regard?

A That not only did they intend to -- their record spoke for the fact that they would because of the fact they had engaged in 300 syndications, all of them having gone forward, and that their veracity with respect to this was their password into the business world.

MR. POLLACK: Same objection, your Honor.

THE COURT: Overruled.

Q Did you discuss with Mr. Rudorian his financial ability to consummate the transaction in accordance with

its terms?

A Yes.

Q What did he say to you in that regard?

A Mr. Ruderian, the main thrust of what he said, again, is the fact that they had engaged in the number of deals I have cited before, that their reputation with respect to making these transactions work was well known and thus, that their record itself supported the fact that they could also make this transaction viable.

Q Mr. Boyer, in the course of your conversation with Mr. Ruderian, did Mr. Ruderian in any way intimate that he was unwilling or unable to go forward with the transaction in accordance with its terms?

A No.

MR. POLLACK: Objection to the form of the question.

THE COURT: Overruled.

Q Mr. Lipkin was present during the course of this conversation?

A Yes.

Q Were you on a loudspeaker phone?

A I don't remember whether I was or not.

Q Do you recall whetheror not you brought to Mr. Lipkin's attention, either by means of loudspeaker phone

or otherwise, what Mr. Ruderian had told you in response to your questions?

A Yes.

Q Did you tell him substantially what you have just told the Court?

A Yes.

MR. CRACO: I have no further question of this witness.

THE COURT: Cross-examination.

CROSS EXAMINATION

BY MR. POLLACK:

Q At the time of your audid, did you know the net worth of Continental Recreation Company, Ltd.?

A No.

Q Did you inquire as to the net worth of Continental Recreation Company, Ltd.?

A No.

Q You knew, did you not, that neither Mr. Ruderian nor Mr. Spiegel had guaranteed the contract for Continental Recreation Company, Ltd.?

A Mr. Pollack, I was not conducting the audit. I was not part of the audit. I had no audit function, so, therefore, whether I knew any of these things, I just didn't -- I didn't inquire.

I wasn't being asked to do anything but call Mr. Ruderian and find out the facts I have testified to.

MR. POLLACK: Your Honor, may I have an answer to the question, please?

THE COURT: I think he answered it. He was asked to call Ruderian. He did.

Q Was that your total participation in the audit?

A Yes.

Q Did you ask Ruderian whether he had guaranteed the contract with Continental Recreation Company, Ltd.?

A I only asked him the questions I testified to.

MR. POLLACK: May I have an answer to that question, please?

THE COURT: That's an answer.

Q Did you ask Ruderian whether Spiegel had guaranteed the contract for Continental Recreation Company, Ltd.?

A I only asked the questions I have testified to.

Q Did Continental Recreation Company, Ltd. ever make a donation to your charities that you spoke of earlier?

A I don't even know the name of the corporation you are referring to.

Q You did not, at the time, either, did you?

A No.

Q In fact, you knew nothing whatsoever about Continental Recreation Company, Ltd. at that time? Is that correct?

A I only asked the questions I testified to.

THE COURT: That's not the question.

Did you know anything about it?

THE WITNESS: No.

Q Did you make a memorandum of your conversation with Mr. Rudorian?

A Mr. Lipkin was present at the time and I did not.

Q Did Mr. Lipkin make a memorandum of your conversation with Mr. Rudorian?

A I don't know.

Q Did you ask Mr. Rudorian to write you a letter confirming the transaction with the Firestone Group, Ltd.?

A No.

Q Did he ever do so?

A Not to my knowledge.

MR. POLLACK: No further questions, your Honor.

MR. HAIMOFF: I just have one question, your Honor.

CROSS EXAMINATION

BY MR. HAIMOFF:

Q Mr. Boyer, in the course of the contacts that you had with Mr. Rudorian, both business and in philanthropy, did it come to your attention that the reputation that he had was to buy and resell before making final payment on his agreements? Did that come to your attention?

MR. CRACO: If your Honor please --

MR. HAIMOFF: He can say yes or no.

MR. CRACO: Excuse me, your Honor. I don't think that is competent reputation testimony and it goes to a set of facts and I don't know whether it's properly cast in the form of reputation.

THE COURT: I don't think so either.

MR. HAIMOFF: I have no objection to withdrawing the word "reputation" and I ask you this question, then:

Q Did it come to your attention that the business methods or the business method of operation employed by Rudorian was to buy and resell before making final payment on his agreements?

A No.

Q That did not come to your attention?

A No.

MR. HAIMOFF: Nothing further.

MR. POLLACK: Your Honor, I have another inquiry, if I may.

FURTHER CROSS EXAMINATION

BY MR. POLLACK:

Q Did Mr. Rudorian, in the conversation which you had with him, tell you that there was a group of Hawaiian investors who were going in on this transaction with him?

A No.

Q He said nothing whatsoever about that in that conversation?

A No.

Q Did you ever hear of Hawaiian investors being involved with Rudorian in this transaction?

A No.

MR. POLLACK: Thank you, your Honor.

MR. CRACO: No further questions, your Honor.

THE COURT: You are excused, Mr. Boyer.

(Witness excused.)

MR. CRACO: Charles Chazen.

C H A R L E S C H A Z E N, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CRACO:

Q Mr. Chazen, where do you live?

A I livein Los Angeles, California.

Q What is your occupation?

A I am a Certified Public Accountant.

Q Are you with a firm?

A Yes.

Q Laventhol?

A Yes.

Q Are you a partner of Laventhol?

A Yes, I am.

Q Were you a partner of Laventhol in 1969?

A Yes, I was.

Q How long have you been employed or a partner of the Laventhol firm and its predecessors?

A I have been a partner of Laventhol and its predecessors about 17 years.

Q Would you describe to the Court, please, what if any particular responsibilities you have at Laventhol?

A I am the firm's national partner of accounting

and auditing.

Q Would you describe what the duties of that position are?

A Well, the firm's national partner for accounting and auditing is responsible for developing the firm's auditing standards, interpreting accounting principles as they are pronounced by the various bodies, acting in an advisory capacity, providing authoritative source for information which may be required during the course of engagements, developing the firm's accounting and auditing manuals, and generally being the last word in accounting and auditing.

Q For the entire national firm?

A For the entire national firm.

Q Did you occupy that position in the latter part of 1969?

A I did.

Q Would you describe to the Court, please, your educational background?

A Well, I attended Northwestern and De Paul Universities. I became a Certified Public Accountant in 1950.

I am a member of the CPA Societies in Illinois and in California.

Q Do you hold any memberships on bodies of the American Institute of Certified Public Accountants?

A Yes, I do.

Q On what bodies do you hold memberships?

A I am a member of the Auditing Standards Executive Committee of the American Institute of Certified Public Accountants and have been for about -- this is my sixth year.

Q Would you tell the Court what that body is?

A That body is the highest technical body which develops auditing standards, issues auditing pronouncements and decides how Certified Public Accountants who are members of the American Institute should audit.

Q How many members are there on that body?

A 21.

Q Have you held any positions of responsibility with the California Certified Public Accountants Society?

A Yes, I have.

Q What positions of responsibility have you held with that group?

A I am presently the chairman of the State Society's AccountingPrinciples and Auditing Standards Committee, and I am a director of the Los Angeles Chapter of that Society.

Q Would you describe to the court what the function of the State Accounting Principles and Auditing Standards Committee is?

A It's our duty to assist and advise the various members of the California CPA Societies in matters of accounting and auditing, to answer exposure drafts issued by national bodies in connection with matters of accounting and auditing, to --

Q What is an exposure draft?

A An exposure draft is a statement issued by a body for purposes of getting, soliciting comments from members of the Institute or whatever body issues it.

Q I interrupted you. Go ahead.

A Generally, the Accounting Committee is the committee which, again, is the highest committee in the State or of the State society for purposes of accounting and auditing interpretations.

Q Have you occupied any positions which have called upon you to make adjudications of accounting or auditing disputes?

A Yes.

Q In what capacity?

A I am a member of the National Arbitration Board panel and I have been selected from time to time to be an arbitrator in matters.

Q Relating to accounting procedures?

A My function -- the Arbitration Board consists of three members, generally, one of whom is an accountant, so that the accounting matters are in his domain.

Q The answer to my question is yes?

A Yes. I'm sorry.

Q Have you written for Learned Journals and other publications on the subject of auditing standards and accounting principles?

A Yes, I have.

Q And have those articles been published?

A Yes, they have.

Q Did there come a time in 1969 when it came to your attention that Laventhol was engaged in an audit of the Firestone Group, Ltd?

A Yes.

Q In point of time, when did it come to your attention?

A During the actual course of the examination, which probably was maybe the early part of December of '69.

Q And did this matter come to your attention in your capacity as the national audit partner?

A Yes, it did.

Q Who brought it to your attention?

A Mr. Lipkin.

Q Mr. Arnold Lipkin?

A Mr. Arnold Lipkin.

Q Would you tell us the circumstances under which Mr. Lipkin brought this matter to your attention?

A There was a complex transaction that he needed some advice on in terms of proper reporting in a financial statement.

Q And did he come to you and ask your advice?

A Yes, he did.

Q Did you have a conversation with him at that time?

A Yes, I did.

Q Would you tell us the substance of that conversation?

MR. POLLACK: Objection, your Honor. Hearsay.

THE COURT: Overruled.

A The transaction had to do with the purchasing and selling of interests in real estate and the question related to the proper method of, the proper method of --

THE COURT: I'm afraid you are not answering the question.

You were asked to state what was the conversation.

Q Is this what Mr. Lipkin told you?

THE COURT: What did you say and what did Mr. Lipkin say?

THE WITNESS: Mr. Lipkin asked me how to report the income from the transaction involving the purchase, involving the sale of interests in real estate.

And I gave him my advice on the method of handling it.

THE COURT: What did you say?

THE WITNESS: I told him that because -- I told him that the proper way to handle the transaction was to report two $25,000 payments provided by the contract plus an amount of the balance of the income measured by the circumstances, one of which was the amount of damages provided for in the agreement, a total of 200 -- was it -- I forgot now -- 185 -- $235,000.

Q Did you on that occasion discuss the deferral of a portion of the income?

A Yes, I did.

Q Let me make sure that this doesn't get lost in the shuffle.

Did Mr. Lipkin in the course of the conversation -- by the way, was there more than one conversation?

A Yes, there were several.

Q In the course of these conversations, does Mr. Lipkin make available to you the materials he had in connection with this transaction?

A I didn't -- I don't remember looking at any material other than the financial statements or the financial statement drafts.

Q Did he describe the transaction to you?

A Yes, he did.

Q And did you, in the course of that conversation, become aware of two versions of the Laventhol statement?

A No. I wasn't aware of two versions.

Q Have you subsequently seen a version of the Laventhol statement other than the one that eventually was issued?

A Yes, I have.

Q I show you Exhibit A-4 and I ask you whether that is the further version that you have since seen?

A Yes.

Q When did you first see that?

A As I recall, I first saw that when I was discussing the case with you.

Q Have you in the course of time since this transaction had occasion to review the financial statement which was issued by Laventhol?

A Yes, I have.

Q I show you Exhibit 7 in evidence and ask you to have that before you while I ask you certain questions.

I draw your attention to the first page. That consists of the report of the auditors, does it not, in its opinion?

A Yes, it does.

Q Did you specifically discuss with Mr. Lipkin at any time the content of the opinion to be rendered by Laventhol?

A Yes, I did.

Q Would you tell us what you said to Mr. Lipkin and he to you in connection with that matter?

A I told Mr. Lipkin that because of the think equity that the buyer had in the transaction as a result of these more two $25,000 required payments, as compared with the total sales price, that we could not give a clean opinion

I mean an unqualified opinion.

I told him that because there was no recourse to the buyer, because it was a purchase money mortgage, that conservative accounting dictated a qualification with respect to the collectability of the receivable resulting from the transaction and Mr. Lipkin under my concept and agreed and made the change. He made this report up.

Q I draw your attention to the opinion contained in Exhibit A-4 and I ask you whether that opinion is in your terms a clean opinion or not?

A Yes, it is.

Q And is the opinion contained in Exhibit 7 a clean opinion or not?

A No, it is not.

Q Based upon your knowledge and experience in these matters, is the opinion contained in Exhibit 7 more or less conservative than the opinion contained in Exhibit A-4?

A More conservative.

Q With respect to the reporting of this transaction generally, have you studied the opinion which was ultimately rendered in the form of Exhibit 7 with a view towards forming an opinion as to whether or not the reporting of the revenue from the transaction was properly dealt with?

A Yes, I have.

Q And have you formed such an opinion?

A Yes, I have.

Q What is your opinion in that respect?

A It is my opinion that the revenue is properly stated in the financial statement.

Q When we talk about a revenue on Exhibit 7, would you identify by name and number the lines to which you refer?

A Revenue that I am referring to is the item entitled sales in the income section of the consolidated statement of income and retained earnings which is stated in this statement at $22,132.607.

Q Have you formed an opinion with respect to whether or not the disposition of certain property involved in the Monterey transaction was properly reflected on the income statement in Exhibit 7?

A By disposition, do you mean the sale of it?

Q Yes.

A Yes, it has been properly reflected.

Q Would you read the line to which you refer there?

A The sale of the Monterey or the Nursing Home property is included in the 22 million dollar figure as I understand, the 15 million dollar sale.

Q And in the course of your conversations with Mr. Lipkin, did you take any steps to assure yourself that the

contract underlying the purchase and sale were valid and enforcible contracts?

A Yes, I did.

Q Would you describe to the Court what steps you took in that connection?

First of all, let me ask you, did you take these steps during the course of the audit and prior to the rendition of the report?

A Yes.

Q Would you tell the Court what steps you took in that connection.

A Because of the magnitude, the size of the transaction, and because of the circumstances, I felt it wise to verify with someone more experienced in real estate matters that the transaction and the agreements were, those that we could consider enforcible. I went to Mr. Zeman, a partner in our office, who has had a great deal of experience in real estate. Mr. Lipkin and I both went to him, as a matter of fact, and described the transaction to him and he suggested that we call an attorney.

I called an attorney, Julius Borah, with whom we have had dealings in the past --

Q Before you get into that conversation, you knew Mr. Borah to be a member of the Bar of California?

A Yes, I did.

Q Was anybody present with you when you made the call to Mr. Borah?

A Yes, they were.

Q Who?

A Mr. Lipkin and Mr. Zeman. There may have been others but at least those two were present.

Q Did you make this call prior to the rendition of the report?

A Yes.

Q To your knowledge, was Mr. Borah an attorney interested in the transaction as counsel for any of the parties?

A In this transaction?

Q Yes.

A Oh, no, no.

Q He was independent of this transaction, is that correct?

A Oh, yes.

Q Would you tell us what you said to Mr. Borah in substance and what he said to you on that occasion?

MR. POLLACK: Objection, hearsay.

THE COURT: Overruled.

A I called Mr. Borah and described to him the transaction and the contract under which the transaction

or with which the transaction was consummated and I asked him whether this transaction which transferred these interests in real estate was legally enforcible because -- and I explained to him why we were concerned about it, because it was involved in a financial statement of which we were examining and on which we were asked to render an opinion.

He told me that the transaction --

Q Did you describe to him in detail the contents of the contract?

A I don't know what you mean by detail. At that time -- the description of the contract may have even come more from Mr. Lipkin than me because, as I recall, I think we were on the speaker phone at the time. I am really not sure but whatever --

Q My question is, amongst you all, did you tell Mr. Borah the full substance of the terms of the contract?

MR. POLLACK: Objection, your Honor.

THE COURT: Sustained.

Q Go ahead.

A We told Mr. Borah what we thought the contract consisted of in order for him to render a judgment as to its enforcibility.

MR. HAYMOFF: May we have, if your Honor please, what the witness said to Mr. Borah and what Mr. Borah said

to him.

THE COURT: Yes.

A I told Mr. Borah what the contract consisted of --

THE COURT: Sustained.

Q Can you remember what you told him the contract consisted of?

THE COURT: State the conversation, what you said and what he said.

A In substance, I told him that we had a contract which provided for the sale of interests in real estate, that there was no recourse to the buyer as provided in the agreement and I gave him, I told him what the amounts involved were, as I recall, and I asked him whether this contract was legally enforcible within its terms.

He told me that the contract I described to him was a legally enforcible document in his opinion.

Q How long did this conversation take?

A Maybe 15 or 30 minutes.

Q In the course of it did Mr. Borah ask questions about the contents of the contract?

A Yes, he did.

Q Do you recall what those questions were about?

A Not exactly. I don't recall the nature of the questions.

He asked well, if the agreement was signed, I am sure he asked that and I said, yes, it was, because this is the information that I had received from Mr. Lipkin.

Q And Mr. Lipkin was present in the course of the conversation?

A Yes, Mr. Lipkin was there, yes.

THECOURT: Where was Mr. Borah's office.

THE WITNESS: In Los Angeles.

THE COURT: And your office was in Los Angeles?

THE WITNESS: Yes.

THE COURT: Did he ask to see the contract?

THE WITNESS: Well, I don't remember whether he did or not.

THE COURT: Did you offer to bring it over to him?

THE WITNESS: No, sir.

Q At the end of the conversation, did Mr. Borah express his view to whether or not the contract was a valid contract as you had described it?

A Yes.

Q And what was his opinion?

A That it was.

THE COURT: Has Borah been joined in this case?

Q Now, was the conversation that you had with Mr. Borah an audit step that was being taken by Laventhol

in connection with assuring itself of the propriety of its opinion?

MR. HAIMOFF: I object to the characterization, your Honor.

THE COURT: Sustained.

Q Did Mr. Lipkin ask you to make this call to Mr. Borah for a purpose?

A Mr. Lipkin didn't ask me to make the call.

Q Did Mr. Zeman suggest that the conversation be made with Mr. Borah for a purpose?

A Yes.

Q What was the purpose?

A To obtain the answer that I -- to find out about the nature of the contract and its enforcibility for purposes of determining whether or not the transaction we were examining or for purposes of forming an opinion on the transaction we were examining.

BY MR. CRACO:

Q Was it one of your audits, sir?

A Yes, it was one of our audits.

Q Based upon your experience, you developed the opinion that you expressed to the Court about the propriety of the accounting treatment accorded the purchase and sale.

Would you tell the Court what factors you have taken into account in coming to the opinion that the purchase and sale were properly reflected on the income statement?

A Well, we had in our opinion completed transaction. We had property purchased with executed contracts for transferring those interests in real estate. We had property sold with executed contracts.

The cash or the payments received under the agreement were nonrefundable. The contract represented a valid legally enforcible document; as a matter of fact, even evidenced further by its requirement or provision for liquidated damages.

The amount of the sale was determinable in that the amount was stated in the agreement. The seller, our client, had performed all of the services, substantially all of the services, required under the agreement so that the earning process was virtually complete, and in our opinion, it would have been misleading not to record the transaction --

not to have the transaction reflected in the financial statements.

Q Are you familiar, based upon your experience, with the ingredients that are required in order to regard revenue as properly recorded on the income statement as of a particular accounting period?

A Yes.

Q Would you describe those to the Court?

A Generally there are three requisites.

First, the assets, which result to the seller from the transaction which flow into the seller represented by cash or contracts or receivables, must be retainable by him. They must not be cancellable contracts nor can the money be refundable.

Secondly, the amount of the transaction, the dollar amount of the transaction, must be known, must be evident.

And thirdly, the seller must have performed substantially all of the services required to be performed by him in order to have the transaction a complete one.

Q Based upon your knowledge and experience generally and based upon your familiarity with these transactions in particular, do you have an opinion as to whether or not these characteristics were satisfied in connection with

the transaction in question?

A Yes, I have.

Q What is your opinion?

A In my opinion, this transaction met those tests.

Q Do you have an opinion as to whether or not it would have been appropriate for Laventhol to certify a financial statement which didn't record as revenue and as cost of sales the transactions referred to in this litigation?

A It wouldn't have been proper, in my opinion.

Q Would it have been misleading?

A I believe it would have been misleading, yes.

Q Now, Mr. Chazen, unfortunately for you you have sat through some of this trial with us, and you have heard testimony regarding the method by which the $235,000 of current income was recognized.

Do you recall hearing such testimony in court from Mr. Fell and from others?

A I don't believe I was here when Mr. Fell or others talked about that point.

Q All right.

Would you tell us, as precisely as you can, how you came to the decision to record as current income $235,000?

A Well, there are two steps to this type of a transaction. The first question is, is the transaction one

which is recordable in the circumstances. And the second is when it is recordable, now how should the consideration be evaluated in order to determine how much of income from this transaction is reportable in the period in which the transaction took place.

In our judgment, because there was only a relatively small amount of cash required to bind the deal, as compared with the total sales price, the amount of equity built up by the buyer was not sufficient in my judgment to permit us to record all of the income or to allow all of the income to be recorded in the current period.

Q In that circumstance, were you called upon to exercise just as to how much to record?

A Yes, I was.

Q How do you go about forming such a judgment?

A Well, we have to examine the circumstances, how much money changed hands or is to change hands on a certain enforcible basis, what is the contract worth in terms of its market value in its condition, what provisions are there in the agreement providing for other sums certain, is there recourse to the buyer or is it a purchase-money mortgage. We use all of these in making our decision.

Q Do you take into account what you know about the parties to the transaction?

A Yes, that's a very important ingredient.

Q Would you describe to the Court how you applied these ingredients in coming to the conclusion to record $235,000 in current income?

A Well, the contract provided for two $25,000 payments against the sales price, sum certain. That $50,000 was earned in the period of the transaction.

In addition, we now have to evaluate the receivables. Now, I knew, Mr. Lipkin told me, that Continental Recreation only had $100,000 of net worth. But we also knew that we were dealing with a buyer or a principal who was a man of integrity, a partner of ours knew who a partner of ours had confirmed the transaction with, who we were certain wouldn't in terms of at least required payments, hide behind a corporate cloak and in our judgment wouldn't allow his name to be attached to a forfeited payment because the corporation involved in the transaction didn't have sufficient funds.

So it was our opinion, that, at least recognizing this transaction, should be these two, $25,000 payments, plus an amount equal to the liquidated damages provided for in the agreement or a total of $235,000.

Q Testimony has been offered and argument has been made in this court in this case to the effect that it

was inconsistent of Laventhol to record as current income an amount which took into consideration the liquidated damages provision, and at the same time record the transaction as revenue and as cost of sales. Based upon your knowledge and experience, is there any such inconsistency?

A No, there is not.

4B

Q Would you explain to the Court why there is no such inconsistency?

A Well, we're dealing with two aspects: First, is there a transaction? We must cross that hurdle and we had. There is a transaction. A sale and purchase took place in our judgment, properly recordable.

Now, we must evaluate the consideration received, and in that evaluation we take into account all the factors I enumerated, at least those factors, possibly others if they are present and come to a judgment. In our judgment, the amount stipulated in the agreement as liquidated damages was one factor we had to use in measuring how much income to record.

We didn't pick up liquidated damages as such, we picked up an amount equal to that provision of the total income or the total excess of salesprice over cost of sale.

Q Did you make the assumption in the process of picking up that amount that the contract in fact would not go through in accordance with its terms?

A No, we made no such assumption.

Q Again, there has been testimony elicited here concerning the propriety of certain adjusting entries that were made to reflect the transaction on the bbooks of account after the audit. Were you here for that?

I do not remember whether you were.

A A part of that, yes.

Q Based upon your knowledge and experience, Mr. Chazen, is it improper to provide adjusting entries to a client, for an accountant to provide such adjusting entries to a client by virtue of the fact that the matters covered by that adjusting entry are very substantial?

A No, it is not improper.

Q Would you tell the Court whether or not materiality of a transaction plays any part in the determination of whether an adjusting entry is appropriate?

A Yes, it plays a large part.

Q Would you tell the Court what part it plays?

A When an audit is conducted, an examination conducted, the auditor, in examining the accounts, determines whether they are in such a condition as he would render an opinion on their being stated. When we find minor immaterial adjustments that may be errors or oversights on the part of the accounting personnel, ordinarily we would merely tell them to correct the records at their convenience, but because their significance is not that great, the effect on the financial statements would not be material, we are not concerned.

However, when a transaction of the magnitude of this one, or any material transaction, a transaction we consider to be material, is either incorrectly recorded or unrecorded, one of our principal functions is to record such adjusting entry in adjusting form.

THE COURT: We will take a short recess at this point.

(Recess.)

MR. CRACO: May I proceed, your Honor?

THE COURT: Yes.

BY MR. CRACO:

Q Based upon your knowledge and experience, Mr. Chazen, was the adjusting entry with regard to these transactions appropriate?

A Yes.

Q Do you have an opinion as to whether the adjusting entry was required under appropriate auditing standards?

A Yes, it was required.

Q Mr. Chazen, did there come a time when you had a telephone conversation with anyone outside of Laventhol about the treatment of the income from this transaction on the financial statements of the Firestone Group?

A Yes.

Q Do you remember approximately when that conversation was?

A It was about -- around December 11th.

Q Would you tell us the circumstances of that conversation? First of all, was it in person or on the phone?

A By telephone.

Q Who was on the other end of the phone?

A Mr. Meyer and Dick Firestone, and I believe Scott was present as well.

Q Do you remember the circumstances under which you took that call?

A Yes, I do.

Q Would you describe to the Court the circumstances?

A Well, Mr. Lipkin came into my office on this day in a very sort of agitated manner, and said that he had Lee Meyer on the phone. Lee Meyer had called him and was getting tough about the financial statements and about the way the transaction orthe way the income had been reported, and he asked whether I would engage with him in a conversation with Meyer.

So we had the call transferred to my office.

Q Was it on the speaker phone or not?

A It was on the speaker phone, yes.

Q Did the party on the other end of the line, when it was transferred to you, identify himself?

A Yes.

Q Who did he say he was?

A He said he was Mr. Meyer, Lee Meyer.

Q Did he say or did you know where the call was coming from?

A Yes, I did.

Q Where from?

A It was coming from New York.

Q Do you know where in New York?

A I have an impression it was from the offices in which Mr. Meyer worked.

MR. POLLACK: Objection to his impression, your Honor.

THE COURT: Sustained.

Q Did Mr. Meyer tell you where it was coming from, where he was calling from?

A It's my recollection that he said he was calling from his office.

Q At Allen & Company?

A If that's where he worked. As a matter of fact,

I think the name Allen & Company had come up in the conversation, yes.

Q Are you reasonably certain that that conversation was not on the 15th of December?

MR. POLLACK: Objection to the form of the question.

THE COURT: Sustained.

Q Was that conversation on the 15th of December?

A No, it couldn't have been on the 15th.

Q Are you able to fix the date as being December 11th with reasonable certainty?

A Yes.

Q Have you used any records in refreshing your recollection on that point?

A Yes, I looked at --

Q Yes?

A Yes.

Q What records have you looked at?

A I looked at my time sheet for that period.

MR. CRACO: May this be deemed marked Exhibit H.

Q I show you Exhibit H and ask you whether that is the time sheet to which you referred?

A I guess it is.

Q Is that a record kept in the ordinary course of

Leventhol, Krekstein, and is it the ordinary course of Leventhol, Krekstein to keep such records?

A Yes.

MR. CRACO: I offer it in evidence.

Q Do you have a particular recollection as to what you were doing on the 15th of December?

A Yes.

Q What were you doing?

A I was a panelist in a seminar we were conducting for our Western Region of our firm.

Q Did that panel consume the entire day?

A That was an all-day panel, yes.

Q Were you interrupted in the course of that panel by any conversation with Mr. Meyer?

A No.

Q Or with Mr. Lipkin?

A No.

Q Did you have any conversation with Mr. Meyer or a telephone conversation from Mr. Lipkin prior to the commencement of that panel?

A No.

Q Or after it?

A I had conversation with Lipkin after it.

Q Person-to-person or by phone?

A No, no, person to person, as I recall.

Q From Los Angeles?

A I think so. That was -- December 15th was a Monday. I ordinarily worked Monday nights. I have time on my time sheet which indicates that I may have been consulting with Mr. Lipkin on Monday night. I'm not certain.

5a

Q Is it your recollection that if you were consulting with him on that Monday night, you were consulting with him in person?

A Oh, yes.

Q In Los Angeles?

A Yes.

Q What is it on Exhibit H that refreshes your recollection about the conversation with Meyer being on December 11?

A On December 11, I have two hours charged to the Firestone Group. It's my recollection that in that two-hour period was the conversation with Mr. Meyer.

Q When that conversation took place, just to make sure I understand your testimony, Mr. Lipkin was sitting with you in Los Angeles, is that right?

A Absolutely.

Q Would you tell the Court what Mr. Meyer said to you and you said to Mr. Meyer in the course of that conversation?

A When Lipkin came into the office, I had the call transferred and I think first, I don't ever remember speaking to Mr. Meyer before, and I think Mr. Lipkin introduced me to Mr. Meyer and vice versa, and I said to Mr. Meyer, what has happened, what's the problem.

Mr. Mayer said that he felt that the financial statements on which we had rendered our opinion were misleading in that they did not reflect a total income from the Ruderian transaction, and I told him that we had discussed that transaction and the method of reporting income with our firm with the Firestone Group and that we were convinced that the manner in which it was reported in the statements on which we had rendered our opinion was proper.

He said that he was equally convinced that it was improper because not reflecting all the income was misleading.

Q Did he express a view as to why it was misleading?

A Well, his conversation was, in substance, that since the transaction took place the income must be reported.

Q What did you say in response to that?

A We told him that we agreed that the transaction took place, but we told him that only the income shown in the statement on which we had rendered our opinion was properly reportable in the circumstances.

Q Did he indicate to you why he was concerned about this matter?

A Yes.

Q What did he say in that connection?

A He said that the people to whom they proposed to give the statement might not understand, or words to that effect, the nature of the transaction.

Q Was there anything else to the conversation that you recall?

A Well, after we convinced him or at least he acquiesced that the statements were not going to be changed with respect to this point, he asked whether at least we could introduce or include in the financial statements a schedule analyzing the deferred gross profit, and I told him that the presentation of the gross profit and the deferred gross profit and financial statements in our judgment was proper and properly clear.

We told him that we would -- that in our judgment, the statement should stand as it was.

Q I show you the page of Exhibit ' headed Schedule of Deferred Income, November 30, 1969.

Do you recall when you saw the report and financial statements issued by Laventhol in Los Angeles prior to the conversation with Mr. Meyer whether such a page was in the report?

A I did not see this page in any report that I

recall.

Q Is that such a schedule of deferred income as Mr. Meyer asked be included?

A I don't know what he -- he asked for a schedule of deferred income but I never asked him the details because we didn't countenance any such suggestion.

Q And it is yourtestimony, Mr. Chazen, that that proposal was put to you by Mr. Meyer in this phone call, is that correct?

A That's correct.

Q And rejected by you?

A Yes.

Q How long did the conversation go on?

A I don't know. About 20 minutes.

Q In the course of it, did Mr. Firestone have anything to say that you recall?

A Mr. Firestone, as I recall, merely, not quite as strongly, I guess, again, echoed Mr. Meyer's sentiments in that --

Q Tell us to the best of your recollection what he said.

A To the best of my recollection, Mr. Firestone also asked whether we would reconsider our position and I told him that we would not, that we were satisfied that

it was proper as stated.

Q Just so that the record is clear, was the position that they were asking you to reconsider your position to defer $1,795,000 of the income from this transaction?

A That's correct.

THE COURT: They disagreed with that position?

THE WITNESS: They disagreed with our position, yes.

THE COURT: They thought you should take it into current income?

THE WITNESS: They thought we should take the full amount of income in this financial statement, yes.

Q And that was the position taken by Mr. Meyer and Mr. Firestone in that conversation, is that correct?

A That's correct.

MR. CRACO: Your witness.

MR. POLLACK: At this time, your Honor, I would like to read into the record Answer No. 8-B in the answers to interrogatories supplied to us by Laventhol, Krokstein.

First, I might preface it by reading in the following statement:

"Leonard S. Douglas, being duly sworn, deposes and says:

"'I am a partner in the firm of Laventhol, Krekstein, Horwath & Horwath, and I have read the foregoing interrogatories and the statements contained therein are true of my own knowledge, except to those matters stated on information and belief and, as to those matters, I believe them to be true. The basis of my knowledge for all such statements are the pleadings in this action, the business records of defendant and third-party plaintiff, Laventhol, Krekstein, Horwath & Horwath, and the conversations I have had with my partners."

It is signed, "Leonard S. Douglas."

It is notarized the 29th day of March, 1972.

Interrogatory No. 8-B:

"If the answer to the previous interrogatory is in the affirmative, state the following:

"(B) The date or dates on which each such alleged misrepresentation was made."

The preceding interrogatory asks for any misrepresentations made to Laventhol by Meyer. The (A) deals with this alleged conversation that Mr. Chazen has just testified to.

8(B) places the date: "On or about December 15, 1969."

I might parenthetically call to the attention of the Court that which is obvious, and that is that he testified he was certain it was not --

THE COURT: On the 11th, he said. I heard it.

CROSS EXAMINATION

BY MR. POLLACK:

Q Mr. Chazen, was the opinion of Borah an important factor in your treatment of the Continental Recreation Company, Ltd. transaction?

A I don't know. I don't understand how you mean important. In what respect, important?

Q You considered it important enough to go to Zeman and Zeman thought it important enough to recommend that you go to Borah.

I asked you, did you consider the opinion of the attorney, Borah, an important factor in arriving at your judgment as to how this transaction should be treated by Laventhol?

A We considered it a factor in the overall consideration, yes.

Q Did you consider it an important factor?

MR. CRACO: I object to pressing the point. It's obviously an ambiguous word and the witness is having--

THE COURT: Overruled.

A Relevant to other factors, it was important and to other, some factors, it was not as important so, it has its place in the audit function, yes.

MR. POLLACK: May I have an answer to the question, your Honor?

THE COURT: Would you mind answering?

A It was an important ingredient or I wouldn't have done it, from that standpoint, yes.

Q Did Borah ask to see the contract with Continental Recreation Company, Ltd.?

A Not that I recall.

Q Did Mr. Borah ask for any of the underlying documentation for the transaction with Continental Recreation Company, Ltd.?

A Not that I remember.

Q Did Borah ask for a written summary from you of the transaction with Continental Recreation Company, Ltd.?

A I don't remember, no.

Q Did you make a memorandum of your conversation with Borah?

A Mr. Lipkin was standing there, so I felt no need to make a memorandum.

Q You did not make a memorandum?

A No, sir, I don't recall.

Q Did Mr. Lipkin make a memorandum?

A I can't speak for Mr. Lipkin. I don't know.

Q Have you ever seen a memorandum of that conversation with Borah?

A Not that I recall.

Q Did you make a notation of the Borah opinion in the Laventhol work papers dealing with the audit?

A I was not involved with the Laventhol work papers dealing with the audit. Therefore, I made no such notation.

THE COURT: Please, Mr. Chazen, don't make excuses. Just answer the question.

This trial has been overly long by witnesses trying to argue why they didn't do something, rather than answering questions.

THE COURT: May I ask that the reporter please read the question to the witness.

MR. CRACO: Well, I think he answered it as well as giving the excuse.

THE COURT: Yes. He said he did not.

Q Did you instruct anyone to make a notation of the Borah opinion in the Laventhol work papers?

A I don't remember.

Q Is there any written record of the Borah opinion?

A I don't know.

Q Have you ever seen any written record of the Borah opinion?

A No, I have not.

Q Was there a confirmatory letter sent by you to Borah following your conversation with him?

A There was not.

Q Was there any confirmatory letter sent by Borah to you giving his opinion?

A There was not.

Q Please tell the Court everything that you told Borah about the transaction with Continental Recreation Company, Ltd.

A I called Borah and told him that we were involved in an examination in which there were contracts representing the transfer of interests in real estate and I described the contracts to him.

Mr. Lipkin and I described the contracts to him and asked him whether they were legally enforcible contracts and he said, based on our description, they were.

MR. POLLACK: Your Honor, may I have an answer to the question as to what this witness said to Mr. Borah?

THE COURT: Yes, please.

MR. POLLACK: I do not think it's sufficient.

THE COURT: What did you say and what did he say?

A I said that we were involved in an examination in which these contracts, of which these contracts were a part, and asked him after -- I told him that the contracts were for transferring of interests in real estate.

I am not sure how, whether, what descriptions I gave but Lipkin was there and he probably gave some descriptions as well.

I can't recall the exact words but we told him, I told him what the contract provided as best I know and asked him whether these contracts were legally enforcible.

MR. POLLACK: Your Honor, again, I think it insufficient for the witness to say, "I told him about the contracts." I want to know what he told him about the contracts.

THE COURT: Could you answer the question? What did you say and what did he say?

A I told him that these contracts were in existence and I gave him details as I know them of these contracts.

I don't remember exactly what details I gave him, but they probably had to do with the fact that they were signed, the maker of the agreements, the words in them as best I know them and that's the best I can recall

of what I told him.

MR. POLLACK: Your Honor, regretfully I must press the request.

THE COURT: I think you have it. Pursue another subject. You are entitled to lead. It's cross-examination.

Q Did you tell Borah that the contract contained a liquidated damages provision?

A As I recall, I think I did, yes.

Q Did Borah tell you that in his opinion the contract was enforcible by specific performance?

A I don't know if he used those last two words. I don't recall it.

Q Do you know what specific performance means?

A Yes, I think I do.

Q Was there any discussion with Borah of whether the contract was specifically enforcible?

A I don't know what you mean by specifically, but he told us in his judgment the contract was enforcible within its terms.

Q Do you know what the term "specific performance" means in regard to real estate or a contract for real estate?

A No. I wish you would explain it to me.

Q Did you know at the time?

A Specific performance?

Q Yes.

A Specific performance, the term, I think I understand, yes.

Q What did you understand it to mean at the time?

A I understand specific performance to mean that the actual performance of the deed of the transaction is required.

Q Did you form a judgment at that time as to whether the contract was specifically enforcible by Firestone?

MR. CRACO: Excuse me, your Honor. I think we are getting a little astray here. I object to the form of the question insofar --

THE COURT: Sustained.

MR. POLLACK: May I know the basis of the objection? I would like to follow the subject.

THE COURT: Well, I don't think his judgment has any importance. What facts werebefore the man? That's what I want to know.

Q Did you know at that time what the term "liquidated damages" meant?

A Yes.

Q What did it mean?

A In my -- it meant that should the contract not be -- should the -- should the conditions of the contract be abrogated these damages were sums certain to be paid to the buyer -- to the seller.

Q Mr. Boyer, when for the first time were you consulted on the matter of the audit of the Firestone Group?

A You addressed me as Mr. Boyer. I wonder if you know who I am.

Q Excuse me. Mr. Chasen. I beg your pardon.

A What was your question? I'm [illegible].

MR. POLLACK: Please read the question.

(The question was read.)

A During the course of the examination, during the course of the audit.

Q When?

A The audit was complete and the financial statements either had been or -- had been prepared.

THE COURT: When?

THE WITNESS: Datewise?

THE COURT: Date.

A It was early in December of 1969.

Q It was after the audit was complete?

A After the audit was substantially complete, yes.

Q In other words, you were not consulted on this matter until after December 6th?

A I don't know --

MR. CRACO: I object to that question as grossly misleading, your Honor. That is not at all what he said.

Q Well, when was the audit?

THE COURT: When was it? He ought to know. We weren't there.

Was it December 6th, after December 6th, before December 6th?

A I cannot recall the exact date.

THE COURT: Do you have any notes, diaries about it?

THE WITNESS: May I see my time sheet? Maybe that will shed some light.

Q The Laventhol report is dated December 6th, is that correct?

A Yes.

Q So presumably the audit was complete by December 6th, is that correct?

A Substantially complete, that is correct.

Q So that you did not get consulted on this matter until after December 6th, is that correct?

A I am not sure. I would like to see my time sheets.

I don't know. Maybe the time sheet will show.

MR. CRACO: May I give the witness his time sheet?

THE WITNESS: Apparently I was consulted December 1st and December 2nd.

Q For the first time?

A It seems to be the first time, yes.

THE COURT: When you talked to Borah, did you ask him if Firestone had acquired the property? Answer it yes or no.

THE WITNESS: When I talked to whom?

THE COURT: Borah. Did you ask him if the Firestone Group had acquired the Monterey property?

THE WITNESS: No. The nature -- no.

THE COURT: Did he tell you that they had acquired it?

THE WITNESS: No.

THE COURT: Did you ask him if title had passed?

THE WITNESS: No, because I knew title hadn't passed.

Q How much time did you spend on the matter on December 1st?

A I have time recorded here on December 1st, I have a half hour.

Q How much time did you spend on December 2nd?

A December 2nd, I have one hour. I also -- one hour.

Q Thereafter, did you spend any time on the matter prior to December 6th?

A Yes.

Q When?

A I have time here also on December 4th and 5th.

Q How much time?

A One hour on the 4th and four hours on the 5th.

Q Are there records as to what you did on the audit in connection with the audit on those dates?

A Pardon? There are descriptions -- there is a description of work performed space on the time sheet.

Q Now, in connection with your work on this matter --

MR. CRACO: Excuse me, your Honor. For the sake of the record, may the document to which the witness was referring in the last testimony be marked?

THE COURT: Yes. You may mark it.

MR. CRACO: That will be Exhibit J, I believe, your Honor. The prior one I mismarked.

THE COURT: Are you offering it in evidence as well or just marking it for identification.

MR. CRACO: May I ask a question on the voir dire?

VOIR DIRE EXAMINATION

BY MR. CRACO:

Q Is this similarly a record kept in the ordinary

course of business? 883a

A It is.

MR. CRACO: I offer it.

THE COURT: Any objection?

MR. HAIMOFF: No objection.

MR. POLLACK: No objection.

THE COURT: Received.

(Defendant's Exhibit J received in evidence.)

BY MR. POLLACK:

Q Mr. Chazen, how much time did you spend in total on the Firestone matter up to the date of the private placement on December 16th?

A I don't know. I would have to add up those -- I would have to add up the time on the sheets.

Q Please do it.

A I only have one.

THE COURT: You can do that during the luncheon recess.

Keep going with the questions.

Q Did you, during the time that you worked on this matter, call for the documentation underlying the transaction?

A No.

Q Were you the senior man at Laventhol in connection with this audit?

A No.

Q Who was?

A Mr. Lipkin was in charge of the audit.

Q Were you within the hierarchy at Laventhol, the higher ranking partner than Mr. Lipkin at that time?

A Higher ranking?

Q Yes.

A In what respect, higher ranking? In dollars or -- sorry. I don't understand it.

Q Were you his superior or was he your superior?

MR. CRACO: I object to the form of the question, your Honor. I waive the objection, your Honor.

A In what respect?

THE COURT: Did you give him instructions? Was he under your direction?

THE WITNESS: Yes, in accounting, yes.

Q Mr. Lipkin came to you for advice on the accounting treatment of this transaction, is that correct?

A That is correct, yes.

Q You gave him advice, is that correct?

A Yes.

Q You neither looked at nor asked to look at any

of the underlying documentation of the transaction, is that correct?

A That is correct.

Q Did you look at the contract itself with Continental Recreation Company, Ltd.?

A I may have. I am not sure. I don't remember.

Q Did you have the contract of Continental Recreation Company, Ltd. in front of you when you called Borah?

A I don't remember.

THE COURT: Where was Borah's office in relation to yours in Los Angeles?

A He is downtown in Los Angeles and we are in mid-Wilshire -- about five or six miles, I guess.

THE COURT: Half hour by taxi?

THE WITNESS: Possibly, yes.

THE COURT: No more than that?

THE WITNESS: No more.

Q Is this document your time sheet for the two weeks ended November 22, 1969, on Firestone?

A This looks like my time sheet, yes.

Q Is it in your handwriting?

A Yes, this is my handwriting.

MR. POLLACK: I offer it in evidence as A-25.

MR. CRACO: No objection.

MR. HALMOFF: No objection.

THE COURT: Received.

(Defendants' Exhibit A-25 received in evidence.)

Q The only reference to Firestone Group on A-25 is the last line, is that correct?

A May I see it?

(Handing.)

A Yes, that is correct.

Q Please read to the Court the description of work performed for Firestone.

A Telephone conversation -- that is TC -- ALL -- Lipkin's initials, so looks like "Option call with Dick Firestone."

Q "Option," is that correct?

A "Option" -- I think "option call," yes, "With Dick Firestone."

Q I ask you to look at this again and tell the Court whether in fact it says "optin contract."

A No. It does not say "option contract."

That is not the way I would write "contract."

Q What was the option that you were discussing with Mr. Lipkin involving Firestone?

A There was a telephone call with Mr. Firestone -- must have been that day -- which he placed to me, he said from a bar in Beverly Hills. Apparently he had some idea in mind and wanted to discuss the accounting ramifications.

As I recall, he had called Mr. -- he had called for Mr. Lipkin, and as I remember, Mr. Lipkin was out of town or somewhere else and I was asked to call him back, which I did, merely for the standpoint of discussing accounting of a fictitious or proposed or artificial transaction.

Q Mr. Chazen, what was the sum of your experience in real estate matters?

A In the course of my 23 years as a certified public accountant and years prior to that before I was a CPA, I have been involved in accounting for a great number of real estate matters.

Q Is it standard procedure for auditors to make a notation in their work papers of substantial or material matters that they have examined or investigated in connection with an audit?

A It would not be inappropriate to do that, yes.

Q In fact, it is standard procedure to do so, is it not?

A I don't know what you mean by standard. The

standards do not require it, no.

Q Are you familiar with SAP 33?

A Yes.

MR. POLLACK: I read to the Court paragraph 14 of Chapter 3 which reads --

MR. CRACO: Excuse me. Before you read it, may I ask whether you are reading from the version that was in effect in 1969 or the version that is in effect now.

MR. POLLACK: 1969.

"The matter of due care concerns what the independent auditor does and how well he does it. For example, due care in a matter of working papers requires that their content be sufficient to support the auditor's opinion and his representation so as to compliance with auditing standards."

Q Do you have any quarrel with that provision as being the standard that governed work papers at that time?

MR. CRACO: I object to the form of the question. That's not what the document purports to be.

THE COURT: I think the question is objectionable in form.

Q Does that, to your knowledge, reflect the standard that was generally acceptable with respect to the matter discussed in paragraph 14?

A Yes.

MR. CRACO: Paragraph 14 of what chapter, please?

MR. POLLACK: 3.

Q You have no quarrel with that paragraph, is that correct?

A No.

Q You testified on direct that you had responsibility for the development of auditing standards for Laventhol, is that correct?

A Yes.

Q Has Laventhol, within the past year, been the respondent in proceedings brought by the Securities and Exchange Commission for faulty auditing standards?

MR. CRACO: I object to that question as utterly immaterial, your Honor, and quite beyond the scope of these proceedings.

THE COURT: Sustained.

Q You testified to a conversation that you say you had with, among others, Lee Meyer on December 11th.

I now ask you, did you make any memorandum of that conversation?

MR. CRACO: May I hear the question?

(The question was read.)

A I really don't remember.

Q Do you know of any such memorandum?

A Unfortunately, our '69 files cannot be found, so I know of no such memorandum.

Q Who else was on the telephone?

A In my office, Mr. Lipkin was. I think Maury Schwalb was with us and, on the otherend, Mr. Meyers and Dick Firestone and I think Scott was there as well.

Q Who was Maury Schwalb?

A Maury Schwalb was an employee of Laventhol, Krekstein, Horwatch & Horwath.

Q Can you tell us what his function was in connection with the audit of Firestone?

A He was one of the staff accountants. I think he was the manager on the Firestone examination.

Q He was the manager of the audit, is that correct?

A I think so. I am not sure. I don't know if he was the manager at that time.

Q Did Laventhol, as an auditor, rely on Meyer in issuing its report and the financial statements?

A I don't understand that question.

Q Did Laventhol rely in any way on Meyer in connection with the issuance of its report and the financial statements of Firestone?

A Not to my knowledge.

Q You did not in any event, is that correct?

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A I did not rely on Meyer, no.

Q Lipkin did not rely on Meyer to your knowledge, did he?

MR. CHACO: I object to that, as to what Lipkin did.

THE COURT: Sustained.

We will take our luncheon recess.

(Luncheon recess)

892a

AFTERNOON SESSION

3:00 p.m.

C H A R L E S C H A Z E N, resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. POLLACK (Continued):

Q Mr. Chazen, you testified on direct that in connection with the transaction with Continental Recreation Company, Laventhol recognized $235,000 in current income; is that correct?

A That is correct.

Q The $235,000 was composed of three amounts, one of $25,000, a second of $25,000 and a third of $185,000; is that correct?

A That's how -- I don't know what you mean, "composed of," but generally I would say that is correct, yes.

Q Had Firestone received the $185,000 at the time that Laventhal issued its report and the financial statements?

A Not that I know of.

Q Had Firestone received the second $25,000 at the time when Laventhol issued its report and financial statements?

A Not to my knowledge.

Q Did Firestone ever receive the $185,000?

A I don't know.

Q You testified on direct about a conversation that you said occurred on December 11th. Please state the names of all of the participants in that telephone conversation.

A You want me to do that again? I'll be happy to.

In my office were myself and Mr. Lipkin and I think Mr. Schwalb, as I told you before. And on the other end of the phone were Mr. Meyer, Meyers, I don't know how his name goes, and Mr. Firestone and Mr. Scott may have been there but I'm not sure.

Q Did anyone else participate in the telephone conversation?

A I don't recall that anyone else did.

Q Please state everything that each person said during the course of that telephone conversation.

A Well, to the best of my recollection, I started the conversation by saying hello to Mr. Meyer. I was introduced to him by Mr. Lipkin who said, "This is Chuck Chazen." And he gave my title at the time, I think, and I asked Mr. Meyer what the problem was. And he said that the financial statements that he had, and apparently he was referring to them, were misleading in that all of the income was not

picked up and he was pretty insistent that the statement should reflect all of the income during that transaction.

I told him that we had covered this subject in our office pretty thoroughly, that it had also been covered with the Firestone group and that the statement treatment of this income in our opinion was proper, and that we would not give a clean opinion or even this qualified opinion, which we subsequently gave, on a statement which reflected the full amount of his income.

I don't remember, I may have gone so far as to say we would have to give an adverse opinion.

He repeated his request several times in different forms, I don't remember his exact words, and finally, after he dropped this subject, he asked whether we would be agreeable to including a schedule in the statements which detailed somehow the deferred gross income.

I told him that we felt that the statement presentation including the notes were sufficiently clear to indicate what had taken place and the results of what had taken place, and that the statements would have to stand as they were.

Q What did Mr. Firestone say in this telephone conversation?

A Mr. Firestone somewhere along the line echoed

some of Mr. Meyer's comments in terms of the -- he said something about, and I don't remember the words, but in substance he said, "We told you that we felt all the income should be reported."

And I in some similar words, and Lipkin also, we said, "We have gone over this many times and you then knew our reasons for not allowing it."

And that's what he said.

Q What did Mr. Scott say in this telephone conversation?

A I don't remember whether he said anything. I have just a feeling that he was there because someone may have made reference to him as being there, but I don't remember him saying anything.

Q What did Mr. Schwalb say in this telephone conversation?

A I don't think Mr. Schwalb said anything.

Q What did Mr. Lipkin say in this telephone conversation?

A Mr. Lipkin explained, as I did, the fact that the treatment was in accordance with our conversations, discussions, intense discussions, with Mr. Firestone, and that Mr. Firestone knew full well that we couldn't do what it was that Mr. Meyer was asking us to do.

Q Have you now told us everything that Mr. Meyer said in this telephone conversation?

A Everything I recollect, yes.

Q Have you now told us everything that you said in this telephone conversation?

A Everything that I remember.

Q This telephone conversation, according to you, took place on December 11th, a Monday; is that correct?

A I think -- December 11th? Whatever that day was. I think that is correct, yes. December 11th was not a Monday, I don't believe, was it? I think December 11th was in the mid-week, as I recall, because I think the 15th was a Monday. That makes the 11th a Thursday, I think.

Q I stand corrected.

In other words, you say that this conversation took place on December 11th?

A I think that is right.

Q A Thursday?

A Yes.

Q How did Mr. Meyer, according to you, get the financial statement?

A I have no idea how he got them.

Q Are you aware of the fact that Mr. Meyer didn't

receive or ever see a copy of the financial statement and report of Laventhol until December 15th and that he received it and went over it with Mr. Feinberg of Jacobs, Persinger & Parker on that date?

MR. CRACO: I object to the question as to form. It's compounded obviously as well as argumentative.

THE COURT: Sustained.

Q Do you know when Laventhol completed the financial statement and report?

A Not exactly, no.

Q Who would know?

A The man in charge of the engagement, I presume.

Q Would there be any written evidence of when the financial statement and report was completed?

A By "completed," there are various stages of pleadings. I don't understand what you mean.

B Q Was the statement or the report in any way changed between December 11th and December 15th?

A Between December 11th and December 15th? Not to my knowledge. I don't know; I'm not familiar with any change.

THE COURT: Did you examine any of these witnesses before trial?

MR. POLLACK: No, sir, your Honor.

THE COURT: I thought not.

MR. CRACO: It is not exactly true. His partner examined Mr. Lipkin for two lengthy days.

MR. POLLACK: Mr. Craco, did you hear the Court's question?

THE COURT: He has been examining before trial here all week.

MR. CRACO: I heard the Court's question, Mr. Pollack. It was whether you had examined before trial any of these witnesses.

THE COURT: Let us proceed.

Q Is it your testimony that Firestone and Scott and Meyer were all in New York on this telephone conversation in the same office?

A It's my testimony that Mr. Meyer and Mr. Firestone were there and I am not sure about Mr. Scott.

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Q What written evidence would there be in the files of Laventhol on when the financial statement and report were completed and sent to the company or anybody else?

A Ordinarily we have a procedure whereby there is something called a report instruction sheet, which is supposed to indicate whom the statement have been given to, and I think on what day. It's a mimeographed,printed form.

But unfortunately, our office, like many others, suffer from misfiling and improper filing. I'm not sure if that sheet is with the statement or not.

Q So that you have no evidence of the contention you make that Mr. Meyer even had the financial statement and report in his possession on December 11th; is that correct?

MR. CRACO: I object to the form of the question as misstating his testimony and argumentative.

THE COURT: It is argumentative.

Q Do you have any written evidence to sustain or substantiate your testimony that Mr. Meyer had before him the financial statement and discussed it with you on December 11th?

THE COURT: Sustained.

Q Do you have any writing, any written record, to

substantiate your --

THE COURT Sustained. It is starting out wrong. It is argumentative.

Q Do you have any written records indicating that Mr. Meyer received and had in his possession the financial statement on December 11th?

THE COURT: Sustained.

Q Do you have any written record of when the financial statement was distributed by Lavanthol?

A I have no written record, no.

Q Is there any such record in the files of Lavanthol, to your knowledge?

A I haven't looked, so I don't know.

Q Is it your testimony that today, nearly four years after this telephone conversation, you can recall what Lee Meyer said in that telephone conversation?

A In substance, that is my testimony, yes.

Q Is what you testified to substance or is it the testimony about what he said in words?

MR. CRACO: I am going to object to the form of that question.

THE COURT: Sustained.

Q Are you certain that the statements which you attribute to Lee Meyer were not made by Richard Firestone?

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